[1] In United States District Court for the Eastern District of Michigan, Southern Division

Civil Action No. 4259

DETROIT AND CLEVELAND NAVIGATION COMPANY, A MICHIGAN CORPORATION, GREAT LAKES TRANSIT CORPORATION, A NEW YORK CORPORATION, AND NICHOLSON UNIVERSAL STEAMSHIP COMPANY, A DELAWARE CORPORATION, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AN ADMINISTRATIVE & AGENCY OF THE UNITED STATES OF AMERICA, T. J. MCCARTHY STEAMSHIP COMPANY, A MICHIGAN CORPORATION, AND AUTOMOTIVE TRADES STEAMSHIP COMPANY, A MICHIGAN CORPORATION, DEFENDANTS

[Title endorsement omitted.]

Complaint

Filed July 3, 1944

To the Honorable the Judges of the United States for the Eastern District of Michigan, Southern Division:

Detroit and Cleveland Navigation Company, Great Lakes Transit Corporation and the Nicholson Universal Steamship Company bring this action against the United States of America, the Interstate Commerce Commission (hereinafter sometimes referred to as the Commission), and T. J. McCarthy Steamship Company and Automotive Trades Steamship Company (hereinafter sometimes collectively referred to as Defendants) for the purpose of enjoining, setting aside, and annulling an order of the Commission (annexed hereto as Exhibit A), decided March 7, 1944, and scheduled to take effect on July 3, 1944, in proceedings entitled "T. J. McCarthy Steamship Company Common Carrier Application" Docket No. W-592, and "Automotive Trades Steamship Company Common Carrier Application" Docket No. W-729, and allege:

I

The jurisdiction of this Court over this action is under and pursuant to the provisions of Section 41 subdivision (28) and Sections 43 to 48, inclusive, of Title 28 of the United States Judicial Code.

II

Plaintiff Detroit and Cleveland Navigation Company is a corporation organized under and existing by virtue of the laws of the State of Michigan, having its principal operating office in the Eastern District of Michigan, Southern Division.

Plaintiff Great Lakes Transit Corporation is a corporation organized under and existing by virtue of the laws of the State of New York, having its principal operating office in Buffalo, New York.

Plaintiff Nicholson Universal Steamship Company is a corporation organized under and existing by virtue of the laws of the State of Delaware, having its principal operating office in the Eastern District of Michigan, Southern Division.

All Plaintiffs named are Common Carriers by water, in Interstate or Foreign commerce, in the transportation of motor vehicles and other properties, and as such are subject to the provisions of the Interstate Commerce Act, Part III, United States Code, Title 49, Section 301.

The matter covered by the said order of the Commission, annexed hereto as Exhibit A, arose in the Eastern District of Michigan, Southern Division.

III

The Defendant, United States of America, is sued pursuant to express authority of the Congress of the United States, as provided in Sections 43 to 48 of Title 28 of the United States Code.

The defendant, Interstate Commerce Commission is an administrative agency existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of the said Act.

The defendants, T. J. McCarthy Steamship Company and Automotive Trades Steamship Company are Michigan corporations, having their principal operating offices in the Eastern District of Michigan, Southern Division, and are engaged in the interstate transportation of property by water.

IV

The plaintiffs have been engaged in the interstate transportation of property by water for several score years. In the conduct of their activities the plaintiffs own and operate terminal facilities, steamships and other marine and off-shore equipment and appurtenances representing an investment of approximately $2,000,000.

By applications filed May 31, 1941, as amended October 18, 1941, the defendant steamship lines sought certificates of public convenience and necessity under the provisions of Section 309 (a) and (c) of the Interstate Commerce Act,[1] authorizing continuance (1) of operations in existence January 1, 1940, and (2) of operations not in existence on that day but in existence on February 1, 1941, in interstate commerce, as common carriers by water in the transportation of motor vehicles from and to specified areas on the Great Lakes.

V

On January 1, 1940, and prior thereto throughout the existence of the defendant steamship lines insofar as they were active in the transportation of automobiles, and on February 1, 1941, and subsequent thereto until 1942 the total activities of the defendant steamship lines consisted in chartering three vessels owned by them to the Detroit and Cleveland Navigation Company for operation by the latter in its common carrier activities. Concurrently with the chartering of the vessels as aforesaid there also existed a solicitation agreement between the Detroit and Cleveland Navigation Company and the defendant steamship lines wherein the identity of the defendant steamship lines was merged into and submerged into the identity of the Detroit and Cleveland Navigation Company.

Consistent with the well-established doctrines that were enunciated by the Commission and affirmed by the Courts (United States et al vs. Rosenblum Truck Lines, Inc., 315 U. S. 50) that

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[1] "SEC. 309. (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: Provided, however, That subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application."

"(c) Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

"Grandfather" [2] operating rights will be granted only to a
4 carrier exercising complete control and dominion over the operating vessels to the exclusion of the nonoperating owner;

on November 25, 1942, the Interstate Commerce Commission, by Division 4, dismissed the applications insofar as they pertained to Section 309 (a) of the Act, and also found that the need for the defendant steamship lines' service under the provisions of Section 309 (c) of the Act had not been established, and dismissed the applications in full. Attached hereto as Exhibit B is a copy of the report of Division 4 of the Commission decided November 25, 1942.

Based on a petition for rehearing filed by the defendant steamship lines on January 4, 1943, alleging material changes in the factual situation since the last hearings therein, the Commission reopened and reassigned the applications of the defendant steamship lines for further hearing on June 4, 1943.

VI

Subsequent to the rehearing as aforesaid and the filing of Briefs by defendant steamship lines and plaintiffs Detroit and Cleveland Navigation Company and Nicholson Universal Steamship Company, copies of which are attached hereto as Exhibits C and D, the Interstate Commerce Commission issued its report of March 7, 1944, Exhibit A hereof. In its report and order of March 7, 1944, the Commission found that public convenience and necessity requires operating by the defendant steamship lines as common carriers of motor vehicles, between Detroit, Michigan, and Lake Erie and Lake Superior ports.

Dealing first with the operations between Lake Erie and Lake Superior ports, the factual situation concerning the matter and quantity of proofs submitted is set forth in the Commission's report of March 7, 1944, page 13, of Exhibit A hereof, as follows:

"Although the situation respecting the withdrawal of vessels from service between Detroit and Lake Erie ports is substantially the same as that between Detroit and Lake Superior ports, there is no present demand for the transportation of motor vehicles from Detroit to Lake Superior ports. The witnesses, however, *were of the opinion* that applicants' (defendant steamship lines) vessels will be needed in the transportation of automobiles between the last-mentioned ports when the manufacture thereof is resumed." [Italics furnished.]

The record indubitably establishes that the defendant steamship lines have never, at any time in the past, engaged in the

[2] A term generally used to discriminate a water carrier in operation on January 1, 1940, and continually since.

transportation of automotive vehicles between Detroit and Lake Superior ports. Counterbalancing the mere opinion of witnesses that there may be a need for additional transportation service between Detroit and Lake Superior ports in the future was the testimony and evidence of the established common carriers by water, the plaintiffs herein, that they provided adequate satisfactory transportation service in the past and are and will be in a position to furnish adequate and satisfactory transportation service in the future when and if the need therefor arises concurrently with the resumption of the manufacture of new automobiles for commercial usage.

5

VII.

The finding of the Commission that public convenience and necessity require the certification of the defendant steamship lines to engage in the water transportation of automobiles in the future is predicated upon the following: (1) the investment of the defendant steamship lines in marine and off-shore facilities may be impaired if they do not secure the operating certificates sought; (2) the utilization by the Detroit and Cleveland Navigation Company, in the past, of the facilities of the defendant steamship lines, in and of itself, establishes the past need for those particular vessels; (3) if those particular vessels of the defendant steamship lines had not been so utilized by the Detroit and Cleveland Navigation Company, and if no other or substitute vessels were used in lieu thereof, there might have been a past shortage of transportation facilities; (4) because of the apparent shortage of shipping facilities on the Great Lakes precipitated by current war conditions and the noncomitant diversion of steamship facilities to war activities, there is "uncertainty as to the length of time that may be required to procure and place in operation on the Great Lakes" vessels sufficient to meet future needs when and if automobile production is resumed, with resulting need for large scale water transportation of commercial vehicles; (5) the temporary operating authorities presently possessed by the defendant steamship lines authorizing operations in the transportation of automobiles between the ports on the Great Lakes may not extend until the resumption of commercial automobile production and the tendering of automobiles for water transportation in large quantities, and under certain conditions the authority vested in the Commission, in normal times, to grant temporary operating authorities for a period not in excess of one hundred and eighty days may not accord the shipping situation the full measure of relief it may, under certain conditions, require.

VIII

Section 309 (c) of the Interstate Commerce Act hereinbefore quoted in full authorizes the Commission to certify a common carrier if it is found that the service proposed "is or will be required by the present or future public convenience and necessity." It is admitted by all parties, and so found by the Commission, that there is no present need for the proposed service. There is no current production of automotive equipment for commercial usage and no demand for transportation thereof. In any event the defendant steamship lines possess current temporary authorities issued to them by the Commission under the Second War Powers Act which enable the defendant steamship lines to engage in present transportation if, as, and when the need therefor should arise. As a matter of fact the defendant steamship lines are not now engaged in the transportation of automobiles on the Great Lakes even though they possess current temporary operating authorities, a clear manifestation of present lack of need for such service.

6 The Commission has endeavored to predicate the future need for the proposed service only and solely on the facts set forth in Paragraph No. VII hereof. The record does not supply factural data to enable the Commission to conclude that there was a past need for the service herein proposed by the defendant steamship lines. The Commission makes no such finding. It merely finds that there was need for those particular boats in the Detroit and Cleveland Navigation Company service in the past. The Act does not authorize the Commission to certify boats or vessels; the Commission can certify a proposed service only if there is present or future need for such proposed service.

IX

To the extent that the Commission's findings would certificate the defendant steamship lines herein, predicated substantially on the fact that there may have been a past need for the defendant steamship lines' vessels in the service of another carrier, such findings are based upon errors of law, and the Commission's ultimate findings of the need for the proposed service at present or in the future are unsupported by the evidence and, as a matter of fact, are challenged by the evidence which unequivocally establishes the existence of present and future adequate transportation service by certificated common carriers.

In Philadelphia-Detroit Lines, Inc., Extension of Operations—Detroit, 26 M. C. C. 729, 733, the whole commission, quoting from San Antonio & A. P. Ry. Co. construction, 111 I. C. C. 483, and from Texas & N. O. Ry. Co. v. Northside Belt Ry. Co., 276 U. S.

475, defined the term public convenience and necessity as follows: "The question, in substance, is whether the new operation or service will serve a useful public service, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operation of existing carriers contrary to the public interest."

To the extent that the Commission has failed to take cognizance of the record, which clearly establishes that the purposes sought to be effectuated by the proposed service can and will be served as well by existing steamship lines and that the new operation proposed would endanger or impair the operation of the existing carriers who possess Commission authorization[3] to engage in similar operations and that there is no present or future public need for the proposed service (as differentiated from Commission's findings of a past need for the specific boats), the ultimate conclusions of the Commission are unsound in law, contrary to the record, arbitrary, and capricious.

7 Alleging manifold errors of fact and law in the Commission's order of March 7, 1944, Exhibit A hereof, plaintiff Nicholson Universal Steamship Company under date of April 19, 1944, in due season, filed its "Petition for Reopening, Reconsideration and Postponement of the Effective Date of the Order," attached hereto and made a part hereof as Exhibit E. By order dated June 5, 1944, the Commission by a vote of five to four denied the aforesaid petition of plaintiff Nicholson Universal Steamship Company.

X

Petitions substantially similar to that of Nicholson Universal Steamship Company were filed by plaintiffs Detroit and Cleveland Navigation Company and Great Lakes Transit Corporation on June 30, 1944. Attached hereto as Exhibit F is a communication under date of June 16, 1944, from the Chief Examiner of the Interstate Commerce Commission assuming that the action of the Commission of June 5, 1944, as above in denying the petition of the Nicholson Universal Steamship Company (Exhibit E) automatically disposes of the petitions of plaintiffs Detroit and Cleveland Navigation Company and Great Lakes Transit Corporation. Final formal action of the Commission has not been received on the petitions of plaintiffs Detroit and Cleveland Navigation Company and Great Lakes Transit Corporation but the

[3] The Detroit and Cleveland Navigation Company possesses Certificate No. W-378; Great Lakes Transit Corporation possesses Certificate No. W-154; and Nicholson Universal Steamship Company possesses Certificate No. W-357.

tenor of the Commission's communication of June 16, 1944 (Exhibit F) gives rise to the assumption that if any action is taken thereon, it will be to deny the petitions.

XI

The action of the Commission granting the defendant steamship lines permanent operating authorities to engage in the transportation of automobiles between Detroit and all ports on Lake Erie and Lake Superior resulted from: (1) arbitrarily failing to review all of the evidence of record, and (2) transcending the legitimate bounds of the statutory authority conferred upon the Commission, as specifically defined by the act and interpreted by the decisions of the Commission and the Court, as quoted, and does now cause and will pendente lite continue to cause irreparable damage to the plaintiffs. The action of the Commission, as aforesaid, accordingly has resulted in confiscation, and, unless the enforcement, operation and execution of said order of the Commission is restricted, will continue, in the future, to cause plaintiffs substantial and irreparable damage as aforesaid, for the plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs pray:

First. That the Judge with whom this Bill of Complaint is filed shall call to his assistance, in the hearing and determination of this cause, two other Judges, of whom at least one shall be a Circuit Judge.

8 Second. That process may issue against defendants, United States of America and Interstate Commerce Commission, T. J. McCarthy Steamship Company, and Automotive Trades Steamship Company, and that due and proper service of such process and of this complaint be forthwith made by filing a copy thereof in the office of the Secretary of the Interstate Commerce Commission and another copy thereof upon the Attorney General of the United States, as provided by law, and additional copies thereof upon the defendant steamship lines.

Third: That upon final hearing of this cause this Court adjudge, order and decree, insofar as said report and order of the Interstate Commerce Commission dated March 7, 1944 (Exhibit A), which is now scheduled to become effective July 3, 1944, unless suspended, restrained or otherwise enjoined, grants the defendant steamship lines permanent authorities to engage in the transportation of automobiles from and to ports on Lake Erie and Lake Superior, that it be temporarily and permanently enjoined, that the Court find the aforesaid order has at all times been beyond the lawful authority of said Commission and wholly null

and void, that it deprives plaintiffs of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States, and that said order insofar as it grants the defendant steamship lines permanent operating authorities as aforesaid be perpetually set aside and annulled and the enforcement thereof be perpetually enjoined.

Fourth. That pending said final hearing and in the meantime, a temporary injunction and restraint issue enjoining the defendants from effectuating the report of the Commission decided March 7, 1944 (Exhibit A), to the extent that it would grant defendant steamship lines permanent operating authorities to engage in the transportation of automobiles on the Great Lakes.

9 Fifth. That this Court grant to plaintiffs such other and further relief as may be warranted in the premises.

DETROIT AND CLEVELAND NAVIGATION COMPANY,
a Michigan corporation,

By JAS. T. McMILLAN, *President.*

NICHOLSON UNIVERSAL STEAMSHIP COMPANY,
a Delaware corporation,

By ANGELL, TURNER, DYER & MEEK, *Their Attorneys.*

GREAT LAKES TRANSIT CORPORATION,
a New York corporation,

By ANGELL, TURNER, DYER & MEEK,
Their Attorneys.

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Of Counsel for Plaintiffs.

10 [*Duly sworn to by J. T. McMillan; jurat omitted in printing.*]

11 *Exhibit A to complaint*

INTERSTATE COMMERCE COMMISSION

No. W-592[1]

T. J. McCARTHY STEAMSHIP COMPANY
COMMON CARRIER APPLICATION

Submitted January 12, 1944.—Decided March 7, 1944

Upon further hearing, findings in prior report, 250 I. C. C. 550, that applicants were not in bona fide operation on January 1, 1940, as common or contract carriers by water, in the performance of transportation subject to the provisions of part III of the act, and that present or future public convenience and necessity were not shown to require such operations, reversed in part. Public convenience and necessity found to require operation by applicants as common carriers of motor vehicles between Detroit, Mich., and Lake Erie and Lake Superior ports. Findings in prior report in other respects affirmed.

Additional appearances: W. E. Emblidge and Karl D. Loos for certain water carriers; protestants.

REPORT OF THE COMMISSION ON FURTHER HEARING

By the COMMISSION:

Exceptions to the examiner's report were filed by applicants and protestants; certain of protestants replied to applicants' exceptions; and the proceedings were orally argued. Our conclusions differ from those recommended.

In the prior report, 250 I. C. C. 550, division 4 found that applicants were not in bona fide operation on January 1, 1940, as common or contract carriers by water, in the performance of transportation subject to the provisions of part III of the Interstate Commerce Act, and had failed to show that present or future public convenience and necessity require such operation, and denied their application.

The applications, as amended October 18, 1941, were for certificates of public convenience and necessity under the provisions of section 309 (a) or 309 (c) of the act, authorizing operations by applicants as common carriers by water, in interstate or foreign

[1] This report also embraces No. W-729, Automotive Trades Steamship Company Common Carrier Application.

commerce, in the transportation of motor vehicles[2] between Detroit, Mich., on the one hand, and Cleveland, Ohio, Buffalo, N. Y., and Erie, Pa., on the other hand, and between Buffalo and Cleveland. On oral argument before division 4, applicants indicated that they desired authority to serve other points on the Great Lakes, such as Duluth, Minn.

Upon petition of applicants, we reopened the proceedings for further hearing and postponed the effective date of the order denying the applications until our further order. At the further hearing the Great Lakes Transit Corporation, in addition to protestants Detroit and Cleveland Navigation Company, hereinafter called the D. & C. Company, and Nicholson Universal Steamship Company opposed the granting of the applications.

At the further hearing applicants did not press their claim to certificates under the provisions of section 309 (a) of the act, or question the correctness of the finding of division 4 that applicants were not in bona fide operation as common or contract carriers by water on January 1, 1940. We affirm that finding.

As to the applications under the provisions of section 309 (*e*), division 4 concluded that the evidence submitted was not sufficient to support a finding that the present or future public convenience and necessity required operation by applicants, and that this was particularly true because of the cessation of the manufacture of automobiles and their shipment by water.

12 At the further hearing applicants indicated, as they did on oral argument following the original hearing, that they desired authority to transport motor vehicles between Detroit and all Lake Erie ports and between Detroit and Lake Superior ports. Protestants objected on the grounds that the authority thus sought was beyond the scope of the applications, as amended October 18, 1941. As the additional ports on Lake Erie which applicants seek authority to serve are intermediate to those named in the applications, as amended, the inclusion of such ports would not unduly broaden the applications. The question as to whether the inclusion of Lake Superior ports would operate to broaden the applications is not entirely free from doubt, because of the generality of applicants' irregular route operations which they sought authority to continue under the original applications as amended at the original hearing. Applicants accordingly were permitted to submit evidence in support of the latter request; and evidence in rebuttal was introduced by certain of protestants. In the circumstances, the applications will be considered as requesting

[2] Automobiles, passenger; chassis, commercial; chassis, freight automobile; chassis, passenger automobile; hearses, automobile; trailers, motor vehicle; trucks, panel or commercial delivery; trucks, motor vehicle; set up, on wheels.

authority to transport motor vehicles between Detroit and Lake Superior ports, as well as between Detroit and Lake Erie ports. The objection is overruled.

The controlling interest of both applicants is owned by the same person, applicants' president. Applicants do not seek two certificates. They are agreed that, if their applications are granted, a single certificate may be issued to either of them for itself and as managing agent of the other.

Applicants' president was affiliated with the D. & C. Company in a soliciting capacity for about 9 years prior to 1942. Before that, he had been associated for more than 10 years with various steamship companies engaged in the transportation of automobiles on the Great Lakes. From 1937 to 1942, two of applicants' vessels were chartered by the D. & C. Company and used to transport motor vehicles from Detroit to certain Lake Erie ports. A third vessel owned by applicants was operated by them in the bulk of trade during 1938 and 1939, but also was chartered to the D. & C. Company and used by it to transport automobiles from Detroit to certain Lake Erie ports during the 1940 season and most of the 1941 season. Near the close of the 1941 season the latter vessel was used by applicants to transport a cargo of bulk storage grain from Fort William, Ont., to Buffalo. As of September 30, 1941, applicants' total assets and liabilities approximated $245,900 and $110,800, respectively, and their net worth was given as approximately $135,100. At the time of the further hearing the three vessels were owned by applicants free of any encumbrance.

At the time of the original hearing, two of applicants' vessels were equipped to carry motor vehicles. The third also was so equipped until about 2 months before that hearing, when it was altered to make it suitable for the transportation of bulk grain. Following the cessation of the manufacture of motor vehicles for civilian use since that hearing, the other two vessels were similarly altered. Two of these vessels were completely reconverted to bulk freighters prior to the 1943 navigation season so that they would be available for the transportation of iron ore if required for that purpose. These vessels, according to applicants, could not be operated successfully in the bulk freight trade during normal times, and are considered as obsolete for such operation, especially in relation to modern bulk freighters which have twice the capacity of these vessels. Applicants have retained all of the equipment and parts originally installed in the vessels for the purpose of converting them into motor-vehicle carriers, and are prepared to reconvert the vessels to motor-vehicle carriers upon termination of the present national emergency.

Although there has been no production, or shipment by water, of motor vehicles for civilian use since the original hearing, motor vehicles for military use were so shipped from and to certain Great Lakes ports during the navigation season of 1942, and similar shipments during the season of 1943 were in prospect at the time of the further hearing. By order of August 17, 1942, division 4 granted Automotive Company temporary authority until December 31, 1944, to operate as a common carrier by water, in the transportation of grain from all ports on Lake Superior to all ports on Lake Erie and of automobiles from Detroit to all ports on Lake Erie, on the same vessels at the same time, and by order of September 21, 1942, like operating authority was granted to the McCarthy Company to transport grain and motor vehicles between Detroit and Buffalo, on the same vessels at the same time. Such authority was based upon the immediate and urgent need for the described service. Thereunder, during 1942, applicants transported several hundred motor vehicles for the United States Army from Detroit to Buffalo. These vehicles were loaded and carried on the spar decks of applicants' vessels which were operated in the transportation of grain in bulk from ports on Lake Superior to Buffalo. The transportation of grain was undertaken at the direction of the Office of Defense Transportation. As the result of inquiries received by applicants at the time of the
13 further hearing from a representative of the Army and from a common carrier of automobiles by motortruck, applicants expected to continue to transport motor vehicles from and to the same ports during 1943. Applicants state that they are prepared to transport motor vehicles not only from Detroit to Buffalo, but also from Detroit to the head of the lakes.

Since the original hearing, the situation in relation to the number and capacity of vessels available for the transportation of motor vehicles on the Great Lakes has changed substantially. At the time of the further hearing on vessels of the motor-vehicle carrying type were in operation on the Great Lakes, and a large percentage of all types of vessels formerly used in the transportation of motor vehicles had been requisitioned by the Government and withdrawn from service on the Great Lakes. In their brief applicants advised that since the hearing the Government has elected to return to protestant Great Lakes Transit Corporation 4 of the 14 vessels of that carrier which had been requisitioned. This advice was confirmed by letter dated August 10, 1943, from counsel for that protestant.

Testimony in support of the applications was submitted at the original hearing by representatives of the Ford Motor Company, Chrysler Corporation, and Hudson Motor Car Company of Detroit, and at the further hearing by representatives of the last two-

named companies and of the Pontiac Motor Division of the General Motors Corporation of Pontiac, Mich. In substance, it is that applicants' vessels were essential to the transportation of automobiles from Detroit to Lake Erie ports in the past; that it would not have been possible without them for the water carrier to have handled the automobiles offered for transportation in 1940 and 1941 and that they will again be needed when normal production of motor vehicles is resumed. Similar testimony was offered on behalf of motor common carriers which handle from Buffalo to eastern destinations automobiles transported by water to that point over the Great Lakes. One of the automobile manufacturers was subjected to delays in the transportation of motor vehicles by water during 1941 from Detroit to Lake Superior ports. Another is manufacturing motor vehicles for military use. In view of the large number of vessels which have been withdrawn from service on the Great Lakes since the original hearing, there is present need for the use of applicants' vessels from Detroit to Lake Erie ports. Although the situation respecting the withdrawal of vessels from service between Detroit and Lake Erie ports is substantially the same as that between Detroit and Lake Superior ports, there is no present demand for the transportation of motor vehicles from Detroit to Lake Superior ports. The witnesses, however, were of the opinion that applicants' vessels will be needed in the transportation of automobiles between the last-mentioned ports when the manufacture thereof is resumed.

During 1939, 1940, and 1941, respectively, 44,147, 77,741 and 85,493 motor vehicles were carried on the vessels chartered by applicants to the D. & C. Company. Of the total number of motor vehicles carried by the D. & C. Company the proportions handled on the vessels chartered from applicants were 64 per cent in 1939, 74 per cent in 1940, and 71 per cent in 1941. Thus, prior to the cessation of the manufacture of motor vehicles for civilian use, applicants' vessels were extensively utilized in the transportation of such vehicles.

Prior to the war, the peak period for the movement of automobiles on the Great Lakes commenced in September or early October, with the production of new models. In 1940 and 1941, there were delays ranging from 2 to 4 days in the loading of the automobiles from the docks at Detroit incident to the congestion of such traffic and the inability of the water carriers to handle it promptly, which caused delays in delivery at final destination and resulted in numerous complaints from automobile dealers and distributors. Because of such delays, it was necessary at times to move by motortruck automobiles which had been previously delivered to the docks at Detroit for water transportation.

Before the manufacture of motor vehicles for civilian use was discontinued, protestant Nicholson Universal Steamship Company was engaged principally in the transportation of motor vehicles between Detroit, Cleveland, Buffalo, Milwaukee, Wis., and Duluth, and originally operated four vessels especially designed for that purpose. One of these vessels was converted during 1941 to a combination motor vehicle and bulk carrier. This protestant was engaged also in the transportation of bulk commodities, such as grain, coal, and ore, between certain of these and other Great Lakes ports. Eight bulk freighters were operated by it in the latter service, and the spar decks of these vessels were used by it in transporting automobiles chiefly from Detroit to Duluth. At the original hearing this protestant submitted evidence to show that its vessels had not been operated to capacity in the past for the transportation of automobiles. At the further hearing, it showed through representatives of two dealers in certain makes of automobiles and trucks manufactured prior to 1942 by the
14 Chrysler Corporation, that these dealers received shipments of motor vehicles by water at Cleveland in 1941, most of which were handled by this protestant; that they experienced no delays to such shipments, and that the service was satisfactory. With the cessation of the manufacture of automobiles for civilian use, this protestant engaged in the transportation of certain bulk commodities. At the time of the further hearing, it operated nine vessels. Five of these vessels are owned by and apparently operated for the Federal Government. Protestant has begun negotiations to reacquire these five vessels at the termination of the war. It intends to reengage in the transportation of motor vehicles when their manufacture for civilian use is resumed, and to make available vessels adequate for the transportation of such tonnage of these vehicles as may be offered.

Prior to early December, 1941, protestant D. & C. Company operated six combination passenger and package freight vessels, and, in addition, four freight vessels which it used exclusively for the carriage of motor vehicles between Detroit, Cleveland, and Buffalo. Three of the latter vessels were chartered from applicants. At the time of the further hearing it was operating five combination passenger and package freight vessels, the Government having requisitioned two of its vessels (one, a combination passenger and freight vessel, and the other, an automobile carrier), the charters on the other three automobile carriers having been canceled or relinquished. This protestant contends that it has in the past supplied sufficient facilities to meet the needs of shippers of motor vehicles served by it and states that it intends, insofar as it is capable of doing so, to make facilities or their

equivalent available at the termination of the war. The testimony of this protestant with respect to its plans for the future was submitted by its general manager and was based upon information obtained by him from protestant's president. It was objected to by applicants as hearsay. The objection is renewed by them upon brief. From a practical standpoint the witness, having knowledge, acquired in the course of his employment as a responsible official of protestant, of its present and past operations, and, so far as they can be determined with any degree of certainty, of its future operations, was sufficiently qualified to testify generally as to this protestant's plans or intentions with respect to providing facilities for the transportation of motor vehicles when the war terminates. The objection, therefore, is overruled. This protestant has in the past transported automobiles on its combination passenger and freight vessels, and at the further hearing expressed the opinion that it would be able adequately to provide for the needs of the Army in the transportation of motor vehicles between Detroit and Lake Erie ports during 1943. The evidence shows, however, that generally during the summer tourist season, extending from June to September, this protestant transports many passengers and their automobiles on its vessels, and in many instance there is little or no space available for other motor vehicles.

Prior to the requisition of its vessels by the Government in 1942, protestant Great Lakes Transit Corporation had been engaged in the transportation of passengers and property on the Great Lakes for more than 25 years. At the time of the further hearing it had pending before us an application for a certificate under the "grandfather" clause of section 309 (a) of the act, authorizing it to continue operations in existence on January 1, 1940, and continuously thereafter as a common carrier by water of passengers and freight between various ports on the Great Lakes, including operations as a common carrier of automobiles from Detroit to Buffalo. One of its vessels was especially equipped to carry motor vehicles. It also transported motor vehicles on its combination passenger and package freight vessels or package freight vessels. This protestant has not abandoned its transportation business but expects to resume operations when vessels again become available and to provide sufficient facilities to meet the needs of shippers. It contends that its operating rights under the "grandfather" provisions of the act are entitled to protection and that these applications should, therefore, be denied. Since the further hearing, as hereinbefore indicated, the Government has returned to this protestant four of its vessels, and by letter of August 10, 1943, protestant's counsel advised that the expectation was that these vessels would be in operation before the close of the 1943 season.

The record establishes that there was a definite need for applicants' vessels in the transportation of motor vehicles between Detroit and Lake Erie ports prior to the cessation of the manufacture of motor vehicles for civilian use. It also shows with reasonable certainty that there will be a like need for them in that service at the termination of the war or when normal production and shipment by water of motor vehicles for civilian use are resumed. Witnesses representing manufacturers producing the bulk of the automobiles at Detroit testified as to this need in the future, not only as to transportation between Detroit and Lake Erie ports but also as to Lake Superior ports; that in the absence of applicants' vessels it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941, and that with the resumption of automobile manufacture the use of applicants' facilities will be necessary in the handling of such traffic. Refusal of applicants' right to initiate such operations with their own vessels might seriously impair their investment in those vessels and while that fact is not controlling, the refusal would according to this record deprive shippers of necessary transportation facilities which would not in the public interest.

Although the expectation of protestants is that considerable tonnage will be available at the termination of the war, there is admittedly much uncertainty as to the length of time that may be required to procure and place in operation on the Great Lakes additional vessels adapted to their needs. Replacement by protestant D. & C. Company of its combination passenger and freight vessels alone will not adequately meet the needs of this service when conditions become normal, for the reason that during a substantial part of the navigation season such vessels were used in the past, and doubtless will again be used, for the transportation of passengers and their automobiles, leaving them with little, or no carrying capacity for other motor vehicles. So far as appears, this also was and will be true of the combination passenger and freight vessels operated by protestant Great Lakes Transit Corporation. At certain times during the period prior to 1942, there were insufficient vessels, including applicants' vessels, fully to meet the needs of shippers of motor vehicles and similar situations may likely arise at such times in the future after the war upon the resumption of normal production of motor vehicles. As has been stated, applicants own three vessels which can be reconverted into motor vehicle carriers without much difficulty. The necessary materials and equipment for that purpose have been retained. It is their intention to so reconvert upon termination of the present emergency. Unquestionably, the public

interest will be adversely affected if, after the production of automobiles is resumed, protestants are delayed in acquiring the additional facilities which they indicate will be necessary to meet the increased demands for transportation.

The issuance by us of a certificate is not restricted by Section 309 (c) to present public convenience and necessity, but extends also to future public convenience and necessity. That section provides that upon application we shall issue a certificate to any qualified applicant if we find that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to part III of the act and the requirements, rules and regulations thereunder, and that the proposed service is *or will be* required by the present *or future* public convenience and necessity. Applicants have temporary authority to operate as common carriers in the transportation of motor vehicles as heretofore stated. Temporary authority would probably be adequate during the existing emergency insofar as the service is required by present public convenience and necessity. However, such temporary authority extends only until December 31, 1944, the present expiration date of the Second War Powers Act, 1942. Unless Congress extends such expiration date beyond December 31, 1944, temporary authority may not be granted thereafter under section 311 (a) for more than 180 days. Upon the facts here presented, we are not persuaded that temporary authority will meet the requirements of future public convenience and necessity. We are of the opinion that applicants have made a case that the proposed service between these ports will be required and that we would be placing an undue burden on applicants to compel them to renew their applications and present their evidence again at the expiration of the aforesaid temporary authority. These conclusions find support in Arco Auto Carriers, Inc., Extension—Kenosha—Racine, Wis. (not printed), decided December 18, 1943, wherein division 5 said:

The examiner found that public convenience and necessity do not require applicant's proposed operation. His finding appears to have been based in a great measure on the fact that since the date of hearing the production of automobiles for civilian use has been discontinued. "While the curtailment in the production of automobiles during the national emergency results in a temporary diminution in the demand for the transportation of such commodities, it has not been our policy to deny an application because of the changed conditions resulting from the war, if the evidence otherwise supports a grant thereof. Normal conditions including the demand heretofore experienced are bound to recur and applicant should not then be expected to incur the cost and delay of a further proceeding."

We find that applicants were not in bona fide operation on January 1, 1940, as common or contract carriers by water, in the performance of transportation subject to the provisions of part III of the act. We further find that present and future public convenience and necessity require operation by applicants as common carriers by water of motor vehicles by self-propelled
16 vessels in interstate or foreign commerce between Detroit and Lake Erie ports, and between Detroit and Lake Superior ports; that applicants are fit, willing, and able properly to perform such operations, and to conform to the requirements of part III of the act and of our rules and regulations thereunder; and that such operations will be consistent with the public interest and the national transportation policy declared in the act.

An appropriate certificate will be issued to applicant T. J. McCarthy Steamship Company for itself and as managing agent of applicant Automotive Trades Steamship Company. The applications in other respects will be denied.

An appropriate certificate and order will be issued.

MILLER, Commissioner, dissenting in part:

I dissent from this report to the extent it finds that the future public convenience and necessity require the operation proposed by applicants. In my opinion there is no evidentiary support in the record for such a finding. The findings in the prior report of division 4, 250 I. C. C. 550, should be affirmed in all respects.

The fact that applicants' vessels were used as they were to carry automobiles prior to the present emergency and may be needed for that service when the production of automobiles is resumed does not warrant the conclusion that there will be need for the operation of such vessels by applicants as a new carrier in the field. That will not increase the amount of service formerly provided. Those vessels may be operated as formerly by existing authorized carriers under charter. Adequate service has been provided by protestants in the past and there is nothing in the record to show that they will be unable to provide similar service in the future.

All of the conditions set forth in the record are abnormal due largely, of course, to the war. Most of the vessels, including those of applicants, formerly used in the transportation of automobiles on the Great Lakes have been converted for, and are being used in, the transportation of other commodities in connection with the war effort. It is indefinite as to how long present conditions will continue or whether applicants will be able to exercise the authority herein granted upon expiration of their existing temporary authority. In my opinion the decision of the majority is based upon too many assumptions and suppositions to be sound as a matter of law.

After the war there undoubtedly will be a period of readjustment of the operations of many water carriers and the resumption of suspended operations in many instances will no doubt be delayed. In this or similar cases, if an immediate and urgent need for service exists, temporary authority to provide such service may be granted under the provisions of section 311 (a). However, any consideration which we may now give to the conditions above referred to does not afford a sound basis for the granting of certificates under section 309 (c) permanently authorizing the institution of new operations.

I am authorized to state that Chairman Patterson and Commissioners Mahaffie and Rogers join in this expression.

CERTIFICATE AND ORDER

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 7th day of March, A. D. 1944

No. W-592

T. J. MCCARTHY STEAMSHIP COMPANY COMMON CARRIER APPLICATION

No. W-729

AUTOMOTIVE TRADES STEAMSHIP COMPANY COMMON CARRIER APPLICATION

It appearing, That on November 25, 1942, division 4 made and filed its report and issued its order in the above-entitled proceedings, denying the applications therein, and that on March 1, 1943, the Commission, by appropriate order, reopened these proceedings for further hearing, and postponed the effective date of the order denying the applications until the further order of the Commission;

It further appearing, That further hearing in these proceedings has been held, and that the Commission, on the date hereof, has made and filed its report on further hearings containing its findings of fact and conclusions thereon, which said report on further hearing and the aforesaid report of November 25, 1942, are hereby referred to and made parts hereof:

It is hereby certified, That public convenience and necessity require the operation by T. J. McCarthy Steamship Company, for itself and as managing agent of Automotive Trades Steamship Company, as a common carrier by self-propelled vessels, in

interstate or foreign commerce, in the transportation of motor vehicles between Detroit, Mich., and all ports on Lake Erie, and between Detroit and ports on Lake Superior.

It is ordered, That T. J. McCarthy Steamship Company, for itself and as managing agent of Automotive Trades Steamship Company, be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached by this Commission to the exercise of such authority.

It is further ordered, That the holding of this certificate by T. J. McCarthy Steamship Company, for itself and as managing agent of Automotive Trades Steamship Company, be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the applications except to the extent granted, be, and they are hereby, denied.

And it is further ordered, That this certificate and order shall take effect and be in force from and after June 3, 1944.

By the Commission.

[SEAL] W. B. BARTEL, *Secretary.*

18 *Exhibit B to complaint*

INTERSTATE COMMERCE COMMISSION

No. W-592 [1]

T. J. McCARTHY STEAMSHIP COMPANY

COMMON CARRIER APPLICATION

Submitted October 30, 1942. Decided November 25, 1942

Applicants found not to have been in bona fide operation on January 1, 1940, as common or contract carriers by water, in the performance of transportation subject to the provisions of part III of the act, and present or future public convenience and necessity not shown to require such operations. Applications denied.

Sparkman D. Foster for applicants.

J. M. Arnold, Milton P. Bauman, S. S. Eisen, and Charles E. Lewis for protestants.

[1] This report also embraces No. W-729 Automotive Trades Steamship Company Common Carrier Application.

Arthur R. Eldred, Stanley Carpenter, Frank W. Sullivan, Merril Shepard, A. R. Scheff, and F. C. Strickroot for interveners.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by certain protestants. Applicants replied and the issues were argued orally. Our conclusions differ from those recommended by the examiner.

By separate applications filed May 31, 1941, as amended October 18, 1941, T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, hereinafter referred to as the McCarthy Company and the Automotive Company, respectively, of Detroit, Mich., seek certificate of public convenience and necessity under the provisions of section 309 (a) or 309 (c) of the Interstate Commerce Act authorizing operations as common carriers by water, in interstate or foreign commerce, in the transportation of motor vehicles as described in the footnote,[2] between Detroit, on the one hand, and Cleveland, Ohio, Buffalo, N. Y., and Erie, Pa., on the other hand, and between Buffalo and Cleveland. On oral argument applicants indicated that they desire authority to serve other points on the Great Lakes such as Duluth, Minn. The Detroit and Cleveland Navigation Company, hereinafter called the D. & C. Company, and Nicholson Universal Steamship Company oppose the granting of the applications. The Cadillac Cartage Company—Marine Division, rail carriers in official territory, Great Lakes Transit Corporation, and Minnesota Atlantic Transit Company intervened at the hearing but offered no evidence. By consent of the parties the applications were consolidated for hearing and will be disposed of in this report.

Between March 1933, and February 1942, T. J. McCarthy, president and owner of the controlling interest of both applicants, was affiliated with the D. & C. Company in a soliciting capacity. In February 1937, an agreement was executed whereby the D. & C. Company gave to the McCarthy Company exclusive solicitation rights, for a six-year period, on automobiles to be transported by them between Detroit and Lake Erie ports. Under this agreement the McCarthy Company received a fixed percentage of the gross revenues obtained for the transportation of automobiles, and was restricted to soliciting automobile traffic solely for the D. & C. Com-

[2] Automobiles, passenger; chassis, commercial; chassis, freight automobile; chassis, passenger automobile; hearses, automobile; trailers, motor vehicle; trucks, panel or commercial delivery; truck, motor vehicle; set up, on wheels.

pany. On the same date the McCarthy Company and the Automotive Company entered into a charter agreement with the D. & C. Company whereby the D. & C. Company chartered from applicants two vessels for the 1937 season with an option to renew the charters from year to year through the 1942 season. These options were exercised every year. A third vessel owned by applicants was operated by them in the bulk trade during 1938 and 1939, but also was chartered to the D. & C Company for the 1940 and 1941 seasons. On February 4, 1942, after the manufacture of new automobiles had ceased, the solicitation agreement and the charters of the two vessels were canceled by mutual consent of the parties.

Under the solicitation agreement T. J. McCarthy advertised and held himself out as manager of the automobile division of the D. & C. Company. Under the charter agreements applicants' vessels were operated by and under the exclusive control and supervision of the D. & C. Company. The traffic handled was moved under rates and bills of lading issued by the D. & C. Company. While applicants claim operating rights based upon solicitation of traffic by McCarthy and upon the operation of the vessels owned by applicants while under charter to the D. & C. Company, the transportation performed by these vessels before and on January 1, 1940, was performed by the D. & C. Company and not by applicants. Applicants acquired no rights to a certificate under the provisions of section 309 (a) because of the operations of their vessels while under charter to the D. & C. Company. That part of each application filed under the provisions of section 309 (a) must, therefore, be denied, as applicants were not in bona fide operation as common or contract carriers by water on January 1, 1940.

Under section 309 (c) an applicant must show that the proposed service is or will be required by the present or future public convenience and necessity. Applicants introduced several witnesses who testified that applicants' vessels were essential for the transportation of automobiles from Detroit to Lake Erie ports in the past and that these vessels would again be needed after the present emergency when the normal production of automobiles is resumed. Protestants submitted evidence tending to show that their own vessels have not been operated to capacity in the past and claim that no one can predict the necessity for additional service after the war. The evidence submitted in this proceeding is not sufficient to support a finding that the present or future public convenience and necessity require operation by applicants. This is particularly true because of the cessation of the manufacture of automobiles and their shipment by water.

A person engaged in chartering vessels to other carriers subject to the act is itself not subject to the provisions of part III of the act. The carrying of bulk commodities when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities and no nonbulk commodities is exempt under section 303 (b). Applicants may continue such operations without any authorization from us.

We find that applicants were not in bona fide operation on January 1, 1940, as common or contract carriers by water, in the performance of transportation subject to the provisions of part III of the act, and have failed to show that present or future public convenience and necessity require such operation. The applications, therefore, will be denied. An appropriate order will be issued.

PORTER, Commissioner, dissenting in part:

While I agree with the majority to the extent the report finds that applicants were not entitled to certificates or permits permitting continuance of operation as common or contract carriers by water under so-called "grandfather" rights, I cannot agree with the finding that applicants have failed to show that present or future public convenience and necessity require such operations. The majority states that the evidence submitted in this proceeding is not sufficient to support a finding that the present or future public convenience and necessity require operation by applicants. In my opinion the facts of record amply support a contrary finding.

Applicants' own three vessels equipped to carry passenger automobiles. Two of those vessels were chartered by the D. & C. Company from 1937 to February 4, 1942. The third vessel was chartered by that company for the 1940 and 1941 seasons. One of applicants' vessels was, when purchased, an automobile carrier, but the other two were open-hold bulk freighters, which were later converted into automobile carriers at an approximate cost of $40,000 each. As of September 30, 1941, applicants' total assets and liabilities approximated $246,000 and $111,000. From January 1 to September 30, 1941, applicants had gross operating revenues aggregating $104,546.

Witnesses on behalf of the Ford Motor Company, Chrysler Corporation, and the Hudson Motor Car Company, representing approximately 85 percent of the automobile production in Detroit, testified in support of the applications. They urge that applicants be issued authority to operate their vessels in the transportation of automobiles between points on the Great Lakes. They

testified that in the absence of applicants' vessels it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941. They urge that with the return of normal conditions, and the resumption of automobile manufacture, the use of applicants' facilities will be necessary in handling the automobile traffic on the Great Lakes.

During 1939, 1940, and 1941, respectively, 44,147, 77,441, and 85,493 automobiles, respectively, were carried on the vessels chartered by applicants to the D. & C. Company. Of the total number of automobiles carried by the D. & C. Company the proportion handled on the vessels chartered from applicants were 60 percent in 1937, 45 percent in 1938, 64 percent in 1939, 74 percent in 1940, and 71 percent in 1941. From the above it is obvious that prior to the cessation of the manufacture of automobiles, applicants' vessels were utilized to a large extent in the transportation of such vehicles.

Section 309 (c) provides that upon application the Commission shall issue a certificate to any qualified applicant if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed, and that the proposed service is or will be required by the present or future public convenience and necessity. The statute does not restrict the issuance of a certificate to present convenience and necessity. It also extends it to future convenience and necessity. It is true there is no production of automobiles at the present time and, therefore, no apparent necessity for the operation of applicants' vessels in the transportation of such traffic. In the light of past performance, however, it is clear that upon the resumption of automobile manufacture, at the termination of the present national emergency, the use of applicants' vessels will again be necessary in the transportation of automobiles. Accordingly a certificate of public convenience and necessity should be issued to T. J. McCarthy Steamship Company in the capacity of managing agent for itself and on behalf of the Automotive Trades Steamship Company and the application of the latter should be dismissed.

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 25th day of November, A. D. 1942

No. W–592

T. J. McCARTHY STEAMSHIP COMPANY COMMON CARRIER / APPLICATION

No. W–729

AUTOMOTIVE TRADES STEAMSHIP COMPANY COMMON CARRIER APPLICATION

T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company having filed applications under the provisions of section 309 (a) and 309 (c) of the Interstate Commerce Act for certificates of public convenience and necessity authorizing operations by them as common carriers by water, a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That said applications be, and they are hereby, denied.

It is further ordered, That this order shall take effect and be in force from and after January 18, 1943.

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary.*

21 *Exhibit C to complaint*

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket Nos. W–592 and W–729

Applications of T. J. McCarthy Steamship Company and Automotive Trades Steamship Company for Certificates to Operate as Common Carriers in the Transportation of Property Between Ports on the Great Lakes

BRIEF ON BEHALF OF APPLICANTS, T. J. M'CARTHY STEAMSHIP COMPANY AND AUTOMOTIVE TRADES STEAMSHIP COMPANY

Statement of Case

Separate applications were filed under Section 309 (a) and (c) of Part III of the Interstate Commerce Act with the Commission by T. J. McCarthy Steamship Company No. W–592 and Automotive Trade Steamship Company No. W–729. The T. J. McCarthy Steamship Company is a Michigan corporation and sole owner of the Steamer George W. Mead. The Automotive Trades Steamship Company is a Delaware corporation and sole owner of the Steamers T. J. McCarthy, ex Morris S. Tremain and the George H. Ingalls.

T. J. McCarthy owns 85% of the stock in the Automotive Trades Steamship Company and 80% of the stock in the T. J. McCarthy Steamship Company. Each of the applicants claimed to have been in bona fide operation as a common carrier by water during the time specified in subdivision (a) of Section 309 and to have been in continuous operation since that time.

Examiner M. J. Walsh, in his proposed report, recommended that the Commission should find that

"Applicants are common carriers; that public convenience and necessity require operation by applicants as common carriers of motor vehicles by self-propelled vessels in interstate or foreign commerce between points on the Great Lakes; that applicant is fit, willing, and able properly to perform such transportation service and to conform to the provisions of part III of the act and the requirements, rules, and regulations of the Commission thereunder; and that appropriate certificates of public convenience and necessity should be issued, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicants' operations, the requirements of part III of the act, and the orders, rules, and regulations of the Commission thereunder." Sheet 7—Proposed Report.

Exceptions to the proposed report were filed by the Detroit and Cleveland Navigation Company and the Nicholson Universal Steamship Company and the case was orally argued before the Commission.

Subsequently, and on November 25, 1942, Division 4, in its decision sustained the exceptions filed to the proposed report, saying on sheet 3, as follows:

"We find that applicants were not in bona fide operation on January 1, 1940, as common or contract carriers by water, in the performance of transportation subject to the provisions of part III of the act, and have failed to show that present or future public convenience and necessity require such operation. The applications, therefore, will be denied."

In the same decision it was likewise stated on sheet 3:

"A person engaged in chartering vessels to other carriers subject to the act is itself not subject to the provisions of part III of the act. The carrying of bulk commodities when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities and no non-bulk commodities is exempt under section 303 (b). Applicants may continue such operations without any authorization from us."

22 Applicants, on January 4, 1943, filed their petition for reconsideration and rehearing and the Commission subse-

quently entered its order reopening for a rehearing and postponed until the further order of the Commission, the effective date of the order entered in said proceedings on November 25, 1942.

The rehearing took place on June 4, 1943, at Detroit, Michigan.

The Facts

It is not considered necessary to restate in detail the testimony in the original proceedings and the facts as stated in this brief will be confined primarily to the testimony at the rehearing.

At the rehearing of the case, it was shown that during the season of 1942, applicants were requested by the Motor Transport Service of the Ordnance Department of the United States Army to transport automobiles on the Great Lakes, being advised that there were not sufficient vessels to move the vehicles which the Army desired to have moved (R. 383).

Applications for grandfather rights and for a certificate under convenience and necessity was, at that time, pending and it was not necessary to obtain special authority under 311 (a) had it not been that the applicants' three vessels were then under the direction of the Office of Defense Transportation engaged in the transportation of grain from the head of the Lakes to Buffalo, the owners having made the necessary physical changes in the ships so that this could be done. Applicants were advised by the Acting Director of the Bureau of Water Carriers that in the transportation of mixed cargoes of grain and motor vehicles, it would be necessary to publish rates on grain from the head of the Lakes to Buffalo if motor vehicles were carried on the decks of loaded vessels. It was for this reason that an application was filed for special permission to transport such mixed cargoes and to publish the rates on grain on less than statutory notice, the particulars in this respect being in the files of the Commission.

The testimony further disclosed that the situation with relation to the capacity for the transportation of automobiles on the Great Lakes had vastly changed since the original hearing, there being no automobile type vessels left on the Great Lakes (R. 391). Applicant is still ready, willing and able to transport automobiles not only between Detroit and Lake Erie ports, but between Detroit and the head of the Lakes (R. 392).

At the time of the hearing, there had been removed from the automobile service through requisition and sale twenty-one vessels formerly engaged at least to some extent in that service (R. 390; Exhibit 33). At this point it might be stated that it now appears that the War Shipping Administration will return to the Great Lakes Transit Corporation four vessels formerly owned by that company which were included in the vessels mentioned in Exhibit

33. The principal protestant, Nicholson Universal Steamship Company, has sold five of its former automobile carriers to the Government, and these vessels have been converted into bulk vessels. The details of this transaction are in the files of the Commission, but for convenience reference is made to Exhibit 34.

At the rehearing, Mr. N. J. Brennan, Traffic Director of the Chrysler Corporation, again testified that with the change of conditions on the Great Lakes, particularly the fact that the various protestants had lost in all twenty-one vessels formerly available for the transportation of automobiles, that there will be a need for the service of the vessels of these applicants when the manufacture of automobiles is resumed, not only between Detroit and Lake Erie ports, but between Detroit and Lake Superior ports. Similar testimony was given by Mr. William H. Rivett, Assistant Traffic Manager of the Hudson Motor Car Company, who testified in the original proceeding. He stated that his testimony was based upon the fact that with these vessels in operation there were not enough vessels available to move the cars off the docks in 1941. Mr. E. B. Rogers, Traffic Manager of the Pontiac Motor Division of the General Motors Corporation, Pontiac, Michigan, likewise testified that in 1941, even with protestants' vessels, which are now not available, in operation along with applicants, three vessels, which were under charter to protestant Detroit and Cleveland Navigation Company, that there was quite some delay in the transportation of automobiles on the Great Lakes (R. 440). He testified that applicants' vessels were very badly needed when automobiles were being shipped in 1941 and that these vessels would be needed when the manufacture of automobiles was resumed.

23 It was further testified that under normal conditions on the Great Lakes, applicants' vessels could not be operated in the bulk trade, all of the former automobile vessels having been considered obsolete for the bulk trade which resulted in their conversion for the carriage of automobiles (R. 389). This would not apply to Great Lakes Transit Corporation's package freighters, which with the exception of one ship transported automobiles primarily on deck.

The record further shows that applicants have preserved materials from between decks and top decks of their vessels and can easily reconvert them for the automobile traffic after the emergency (R. 385).

There was testimony by certain of the protestants that they would be prepared to add ships as needed for the transportation of automobiles when their service was again required, although the witnesses were very hazy as to how this could be accomplished.

The record is clear that the protestant, Detroit and Cleveland Navigation Company, did not do this when automobiles were available, which accounted for applicants having acquired their three automobile vessels. Testimony was offered by a few small shippers that the service which was furnished them by protestants in 1941 was satisfactory. Mr. McMillan, who testified on behalf of protestant, Detroit and Cleveland Navigation Company, testified that all he knew of his company's plans after the emergency was what he had been told by someone else. He was not an officer or director of the company and had never attended any directors' meetings. His testimony was admitted by the examiner for what it was worth, but is clearly hearsay.

The principal protestant, Nicholson, Universal Steamship Company, who was the largest operator prior to 1941, has sold five of its ships which were formerly automobile carriers. While there is pending negotiations for vessels, or the deck space of vessels, no agreements have been concluded.

The Commission has ruled, through Division 4, Columbia Transportation No. W-773, that vessel owners are subject to the Act if they transport bulk commodities for more than one shipper, although, as previously pointed out, the transportation of bulk commodities by applicants was held exempt under section 303 (b), where the space of the vessel is being used for the transportation of not more than three such commodities.

Argument

The facts in the original proceedings and as developed at the rehearing, clearly show that witnesses, on behalf of all the leading shippers of automobiles, are of the belief that applicants' vessels will be needed for the transportation of automobiles upon the resumption of automobile manufacture. The situation since the original hearing has vastly changed. One of the protestants, in fact, the largest transporter of automobiles having voluntarily disposed of five of its larger automobile carriers, while the other principal carrier, or the other principal protestant, who formerly used, under charter, all three of applicants' vessels, has lost two of its ships, one, a vessel especially reconstructed for automobile transportation, by requisition.

Applicants purchased their three vessels for the transportation of automobiles, they being obsolete for bulk cargo purposes and converted them back to bulk carriers at a large expense with the cessation of the manufacture of automobiles for private use. The three vessels have been operating under the direction of the Office of Defense Transportation in the transportation of grain, for which transportation they will be obsolete after the emergency. The cost of converting to bulk commodities has been sub-

stantial and the cost of converting back to automobile transportation likewise will be substantial.

That these vessels will be vitally needed was borne out by the fact that in 1939 they transported 44,447 automobiles; in 1940, 77,841, and in 1941, 85,493, a very substantial percentage of all the automobiles carried by the Detroit and Cleveland Navigation Company during those three years, the smallest percentage being 64% in 1939.

Section 309 (c) of the Interstate Commerce Act provides that upon application, the Commission shall issue a certificate to any qualified applicant if the Commission finds that the applicant is fit, willing and able properly to perform the service proposed, and that the proposed service is or will be required by the present or future public convenience and necessity.

24 The only case touching upon the rather narrow construction placed on the language by Division 4 which we were able to find was that of Jack Cooper, Jr., and Thom Cooper, Extension: Application No. M. C. 11185 decided by Division 5 on May 30, 1942. Applicants there sought a permit authorizing an extension of operations as a contract carrier by motor vehicle of new trucks and automobiles by drive-away and truck-away methods from Detroit and Macomb County, Michigan, to Wichita, Kansas, over irregular routes. The application was granted. The Commission said in part:

"At the time of hearing, the delivery of 1942 'Models' was expected to be reduced materially. We realize, of course, that there will be few, if any, automobiles to be transported for some time due to the war. Nevertheless, we are of the opinion that Applicants, having made a case upon which we usually grant authority in circumstances such as are of record here, should be granted the authority sought for. Presumably they are in no worse condition than other automobile transporters. In other words, it will be placing an undue hardship on Applicants to compel them to present their evidence over again after conditions shall have changed."

It would appear that in view of the strong testimony offered by Applicants, the fact that they have large investments in ships purchased and converted at great expense for the transportation of automobiles, it would be unjust and unfair to at this time deny their applications and require them at some later date to file an entirely new application and await the outcome. To do this might well be ruinous to Applicants, as under normal conditions on the Great Lakes their vessels would not be used in the bulk trade.

It is respectfully submitted that the majority of Division placed entirely too limited an interpretation on the plain wording of the statute. There is no restriction against the issuance

of a certificate to present convenience and necessity, although it is submitted that the records at the rehearing show that there actually was in 1942 and in all likelihood will be in 1943, a present convenience and necessity for the operation of applicants' ships in the transportation of automobiles and motor vehicles.

In the light of the volume of traffic moved by applicants' vessels immediately before the manufacture of automobiles for public use was stopped and in the sound judgment of the men in charge of the traffic departments for all of the principal shippers, these vessels will be needed in the future. The record is equally clear that they have actually been needed even with the manufacture of motor vehicles limited principally to military purposes.

Protestants will undoubtedly raise the question, as they have in the past, that the amendment to the application is on the wrong form. When an attempt was made at the original hearing to offer testimony upon fitness, willingness and ability to perform or public convenience or necessity, strenuous objections were made and it was for this reason that the case was adjourned and an amended application filed with the approval of the Bureau of Water Carriers. Protestants, in effect, are taking the position that the application should be dismissed because of the form or forms on which they were filed. There is ample authority that applications may be amended to conform with the proofs. See Baggett Transportation Company Common Carrier Application, M. C. 76177, and Becker Transportation Company, Inc., Common Carrier Application, 26 M. C. C. 487.

It is submitted that the proper amendment to include the scope of operations has been made and that if further amendments are required to conform with the proofs the Commission, without injustice or injury to any of the protestants, has the right to make them.

For a review of the testimony at the original hearing the attention of the Commission is directed to the proposed report of the Examiner, which gives a concise history of the background of applicants.

The testimony is undisputed that applicants' vessels are obsolete under normal conditions on the Great Lakes, except for the transportation of automobiles. They were purchased and converted for that purpose—to handle the automobiles which the President of applicants had solicited for the protestant, Detroit and Cleveland Navigation Company, who declined to put on vessels necessary to take care of the traffic.

Protestants' interest in having the Commission deny applicants a certificate is presumably on the theory that if this is done that the vessels will be available for service by one of the protestants on the terms they may outline. The attitude of

two of the same protestants in this respect is strikingly illustrated in their offer to the Nicholson Transit Company, Docket W-732 for the service of their ships before the commencement of the season of 1941.

It is clear, as was pointed out by the examiner in his proposed report, that refusal of applicants' rights to initiate operations with their own vessels would seriously impair, if not entirely destroy, applicants' investment in those vessels.

It was pointed out at the oral argument before the Commission in the original proceedings that there was no desire on the part of applicants to obtain two certificates of public convenience and necessity and it is agreeable that if a certificate is issued that it be issued to either of applicants in the capacity of managing agent for itself and on behalf of the other applicant.

Request for Findings

1. That applicants are fit, willing and able properly to perform the service proposed and to conform with the provisions of the Act and the requirements, rules and regulations of the Commission.

2. That there is a present or future public convenience and necessity for the transportation of motor vehicles as a common carrier between Detroit, Michigan, and Lake Erie ports and Detroit, Michigan, and Lake Superior ports and on all routes between Buffalo, New York, and Duluth, Minnesota.

3. That applicants should be granted a certificate as a common carrier to transport automobiles on all routes on the Great Lakes between Buffalo, New York, and Duluth, Minnesota.

Respectfully submitted.

SPARKMAN D. FOSTER,
Attorney for Applicants, T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, 3666 Penobscot Building, Detroit 26, Michigan.

Dated August 4, 1943.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding, by mailing a copy thereof, properly addressed, to each such party.

Dated at Detroit, Michigan, this 2nd day of August, 1943.

SPARKMAN D. FOSTER,
Attorney for Applicants, T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, 3666 Penobscot Building, Detroit 26, Michigan.

26 *Exhibit D to complaint*

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-592

Application of T. J. McCarthy Steamship Company for a Certificate to Operate as a Common Carrier in the Transportation of Property Between Ports on the Great Lakes

Docket No. W-729

Automotive Trades Steamship Company (Application to Operate as a Common Carrier by Water)

BRIEF ON FURTHER HEARING FILED BY DETROIT AND CLEVELAND NAVIGATION COMPANY AND NICHOLSON UNIVERSAL STEAMSHIP COMPANY

Opening Statement

By petition dated January 4, 1943, T. J. McCarthy Steamship Company, applicant in Docket No. W-592, sought reconsideration of and rehearing in the captioned proceedings. The basis of the aforesaid petition was an allegation "that the situation with relation to vessels for the transportation of automobiles and motor vehicles on the Great Lakes has vastly changed." Included in such allegation were the statements that vessels of the Great Lakes Transit Corporation, Nicholson Universal Steamship Company and Detroit & Cleveland Navigation Company have been requisitioned by the War Shipping Administration and/or title acquired by the United States Government; that the needs of the United States Army with respect to water transportation of motor vehicles is such that no carrier other than the applicant was able or willing to engage therein; and that under normal conditions on the Great Lakes, applicants would be unable to find any use for their ships in the bulk trade.

By order dated May 28, 1943, the captioned proceedings were assigned for rehearing at Detroit, Michigan, on June 4, 1943. At that hearing applicants submitted testimony which inexorably supported the report and findings of Division 4 of the Commission, decided November 25, 1942, dismissing the captioned applications.

Abstract of Evidence

(A) The Issues Herein

These proceedings were precipitated by the filing, by applicants, of applications under Section 309 (a) of the Act, seeking "grand-

father" rights to continue the transportation of specified commodities, including automobiles, by water on the Great Lakes. By amended applications under the "interim operating" clause of Sections 309 (a) and (c), certificates of public convenience and necessity are sought authorizing continuance of operations instituted after January 1, 1940, and existing on February 1, 1941 (R. p. 115).*

The applicants now have abandoned all claims to "grandfather" rights (R. pp. 403–404, 407). They admit that they possess no "grandfather" rights inasmuch as they were not in operation, as common carriers of automobiles, on the critical date. The applications, as they now stand, seek "interim operating" rights to continue the transportation of automobiles between the ports of Detroit, Michigan, and Cleveland, Ohio, between the ports of Detroit, Michigan, and Buffalo, New York, and between the ports of Buffalo, New York, and Cleveland, Ohio (R. p. 408).

27 At the hearing, applicants sought permission to enlarge the scope of their "interim operating" applications to also cover the transportation of automobiles between Detroit, Michigan, and all Lake Erie ports, and between Detroit, Michigan, and all Lake Superior ports (R. p. 412). This attempted amendment was made not to "grandfather" applications but to "interim operating" applications, even though applicants admit they never engaged in automobile transportation to Lake Superior ports. Upon objection duly made, the presiding Examiner stated:

"Exam. McGRATH. Back on the record, I will say at this point, gentlemen, that the Examiner is of the view that the objections raised by the gentlemen on the other side here, seem to be sound, so far as the Examiner's understanding of the applications is concerned. However, Mr. Foster, you may proceed to present your testimony as you have prepared it, and also develop, if you can, the fact that the application has the scope which you are contending it has—that is, as between Detroit and Duluth" (R. pp. 411–412 and as reiterated on page 413).

Perhaps the clearest analysis of the issues here involved is set forth in the following abstract from pages 413–415 of the record:

"Exam. McGRATH. It has not been made clear as yet to the Examiner that the original application, as amended, relates to the transportation of automobiles between Detroit, Michigan, and Duluth, Minnesota, or other ports on Lake Superior.

"Mr. FOSTER. It related to the transportation of other commodities.

"Exam. McGRATH. Yes.

"Mr. FOSTER. Not automobiles.

*Refers to page of transcript of evidence.

"Exam. McGRATH. Yes; and as the Examiner understands it, the present proceeding relates entirely or primarily at least, I will say, to the transportation of automobiles, or motor vehicles.

"Mr. FOSTER. And other commodities.

"Exam. McGRATH. And other commodities?

"Mr. FOSTER. Yes.

"Mr. EISEN. Well then, may I inquire, do I correctly understand——

"Exam. McGRATH. Just a minute.

"Mr. EISEN. Pardon me.

"Exam. McGRATH. What other commodities, counsel?

"Mr. FOSTER. Well, such a furniture, for example, when transported with automobiles, or any other commodity when transported with automobiles; anything that is covered, that is not a wholly exempt commodity.

"Exam. McGRATH. I see.

"Mr. SULLIVAN. What about package freight?

"Mr. FOSTER. Package freight as such we are not claiming.

"Mr. ELDRED. Now, if the Examiner please, may I call your attention to Exhibit B–1 to the amended application, which purports to show the commodities which are asked for; and the only commodities which are mentioned there are motor vehicles.

"Mr. EISEN. Under the interim or public convenience and necessity application.

"Mr. ELDRED. Yes.

"Mr. EISEN. And I understood that was the only thing that was to be considered here today, in view of Mr. Foster's own statement that he is not pressing the grandfather rights here today.

"Exam. McGRATH. Do you have anything further that you wish to say on that point, Mr. Foster?

"Mr. FOSTER. No."

(B) Applicants' Equipment.

Throughout this proceeding applicants strenuously emphasized the fact that they possessed certain vessels which were equipped and otherwise adapted principally for the carriage of passenger automobiles. Interwoven therewith was applicants' allegation that denial of the rights here sought would preclude the future use of the vessels in their then existing state, entirely jeopardizing and invalidating an investment of some $40,000 per vessel, the cost of converting the boats into automobile carriers. Emphasizing this contention of applicants, Commissioner Porter, in his dissenting opinion to the report of Division 4, decided November 25, 1942, said the following:

"Applicants own three vessels equipped to carry passenger automobiles. Two of those vessels were chartered by the D. & C.

Company from 1937 to February 4, 1942. The third vessel was chartered by that company for the 1940 and 1941 seasons. One of applicants' vessels was, when purchased, an automobile carrier, but the other two were open-hold bulk freighters, which were later converted into automobile carriers at an approximate cost of $40,000 each."

28 In the Spring of 1942, the applicants, recognizing the existing conditions would eliminate the availability of passenger automobiles for transportation and taking cognizance of the fact that there "would be a use for vessels in the bulk trade" removed the between deck plankings (R. p. 382). To make the vessels available for the transportation of iron ore, the applicants removed all of the center stanchions, the deck beams, the between deck elevators and in addition strengthened and renewed the bulk heads (R. p. 385). The applicants' vessels are thus practically in the same condition today that they were originally, in 1936. The vessels are therefore not adapted for the carriage of motor vehicles below decks (R. p. 386).

When the applicants purchased their present equipment, the boats were lying idle at docks in Buffalo, New York, and Cleveland, Ohio, where they had been idle for two or three years or more (R. p. 389).

In view of the present construction of applicants' vessels the boats are no longer in the category of automobile carriers but rather in the classification of bulkers.

"Q. (By Exam. McGRATH). Just for the record Mr. McCarthy, when you refer to freighters, what do you mean?

"A. (By Mr. McCARTHY). Freighters, Mr. Examiner, are——

"Mr. SULLIVAN. Bulk carriers?

"A. Bulk carriers, rather than passenger vessels. The two classifications are freighters and bulkers; and then there are automobile boats that were originally bulkers, but by reason of conversion they became automobile boats. Freighters are boats with one hold, and probably two or three compartments, and open hatches on the top, that are used generally in the transportation of bulk commodities.

"Q. (By Exam. McGRATH). In what part of the vessel would automobiles be transported in a vessel of that type—the bulker vessel?

"A. On the deck, when she is strictly a bulker; that is, on the spar deck, or the top deck. They never put any below decks.

"Q. (By Mr. FOSTER.). Now, the construction of the conventional type of vessel used on the Great Lakes, the conventional bulk type of vessel, is that the engines are aft; is that correct?

"A. Yes.

"Q. And the pilot house, and the crew's quarters for the deck crew, are forward; is that correct?

"A. Yes, sir.

"Q. And that leaves a long open space between the coal bunkers aft, and the pilot house forward?

"A. Yes, sir.

"Q. Without any interference at all?

"A. That is right" (R. pp. 387–388).

"Q. (By Mr. Eisen). Mr. McCarthy, on page 51 of the record the Examiner asked you the following questions, to which you made the following answers:

"Q. Mr. McCarthy, you have testified that all your vessels have been refitted for the carriage of automobiles.

"A. That is right.

"Q. I take it from that that they are not suitable for carrying bulk cargoes.

"A. No, not without some reconverting of them back to their original condition."

"Now I want to ask you this question: there has been a change in that situation to the extent that your boats are now bulk cargo boats, and cannot carry automobiles as heretofore unless they are reconverted back; is that right?

"A. (By Mr. McCarthy). Except on the top deck" (R. p. 416).

In view of their present construction the applicants' boats can accommodate no more than 80 automobiles per ship, and that, on the top or spar deck. This capacity is equivalent to that of the so-called freighters or bulkers (R. p. 386). Applicants' present total monthly capacity of all their vessels is approximately 640 to 720 automobiles for transportation between the ports of Detroit, Michigan, and Buffalo, New York (R. p. 388).

(C) Applicants' Present Operations

The applicants' present operations are best summarized by the following abstract of record:

"Q. (By Mr. Eisen). Now on pages 189 and 190 of the record Mr. Foster asked you—I presume referring to your operations other than in the transportation of automobiles—

29 'In other words, you were operating that vessel about as nearly as one could as a tramp steamer?' Then there was an objection, and you said, 'Yes.'"

"A. (By Mr. McCarthy.) What vessel was that?

"Q. The vessel that you were transporting bulk freight in.

"A. Oh, yes.

"Q. That is correct, is it not?

"A. Yes, sir. That was the Ingalls.

"Q. And then on page 190 of the transcript, you defined a tramp steamer as follows: "A tramp steamer would be—you call a tramp

steamer one that not assigned to any port, to any particular and definite trade, working particularly for one shipper or one or two shippers, but you might even get horse manure if you got the right rate and carry it and be glad to have it, or stones, or bulk commodities suitable for dropping into open hatches and lifting out again. As a matter of fact, you could carry steel on that boat, package steel, but there was none offered and we couldn't get any.

"Now, is your operation at the present time other than automobiles any different from that?

"A. We are operating at the present time more or less under the ODT.

"Q. I understand, but——

"A. (Continuing.) And our commodities, the commodities that we carry, have got to be approved by the ODT, or at least have got to be regulated by them.

"Q. Well, other than by reason of any ODT regulations, are you operating any differently? In other words, are you assigning steamers to any particular port, or operating a regular run on schedules?

"A. We go by Detroit with a shipment for Buffalo.

"Q. You go by Detroit?

"A. Yes, sir, and we stop here if there are automobiles to be picked up and taken on to Buffalo.

"Q. But you still run your irregular so-called tramp service, do you not?

"A. Wherever there is grain, at whatever port the grain originates, on to whatever destination it is assigned; but it is not perhaps as broad, as to the 'tramp' end of it, as was originally asked, at that time.

"Q. The only difference, then, is the difference that may be necessitated by the ODT regulations; is that correct?

"A. Yes, sir" (R. pp. 417-418).

"Q. (By Exam. McGRATH.) To what ports do you expect to contemplate handling automobiles in these vessels that have been converted for the handling of iron ore,—or do you not intend to use them for that purpose?

"A. (By Mr. McCARTHY.) Yes, sir. Up until the present time, the vessels that have been converted to carry ore—that is, two of the vessels that have been converted to carry ore are still in the grain trade, with the permission of the government authorities, and we can carry automobiles from Detroit to Buffalo on those ships.

"Q. (By Exam. McGRATH.) Well, is it the purpose to use those vessels intensively this season for the carriage of ore?

"A. Yes.

"Q. (By Mr. FOSTER.) I will ask you to state whether or not, if you were certified as an ore carrier and required to carry ore, it

would be possible for you to schedule your vessels to Buffalo and Cleveland, and to likewise carry automobiles on the decks of those vessels, along with the iron ore?

"A. (By Mr. McCarthy.) Yes, sir.

"Q. (By Mr. Eisen.) Are any of the ore carriers, Mr. McCarthy, to your knowledge, carrying automobiles on their spar decks to Buffalo?

"A. They are not permitted to do so at the present time, as I understand it.

"Q. And none of them are?

"A. No, sir" (R. pp. 419, 420, 421).

Since the last hearing in this proceeding the applicants have transported automobiles from Detroit, Michigan, to Buffalo, New York, only (R. p. 422).

(D) The Current Transportation of Automobiles on the Great Lakes

The applicants were requested, by the Army, during 1942, to transport military vehicles from the port of Detroit, Michigan, to the port of Buffalo, New York. Those were the only ports that the applicants were able to carry automobiles from and to. Throughout the entire season the applicants handled twelve loads of automobiles to the port of Buffalo, New York, aggregating 950 vehicles. (R. pp. 383–384).

The applicants were requested, by the Army, to supply service for the transportation of military vehicles from Detroit, Michigan, to Buffalo, New York, wholly because of unavoidable contingencies which disrupted the automobile transportation service of the Detroit and Cleveland Navigation Company. In 1942 the Navy requisitioned the Steamer Greater Buffalo, owned by the Detroit and Cleveland Navigation Company, for conversion into an aircraft carrier. Prior to this action the Detroit and Cleveland Navigation Company maintained a nightly service between Detroit, Michigan, and Buffalo, New York (R. p. 516). The loss of the Steamer Greater Buffalo necessitated a revision of the existing schedule, reducing boat sailings from nightly service to three sailings per week. This action, of course, automatically and drastically curtailed the automobile carrying capacity of the Detroit and Cleveland Navigation Company between Detroit, Michigan, and Buffalo, New York (R. p. 517). This resulted in need for additional carrier facilities.

For the 1943 navigation season the Detroit and Cleveland Navigation Company made arrangements for the operation of two vessels in the Detroit-Buffalo service and again is operating a nightly sailing. The Detroit and Cleveland Navigation Company has a present average carrying capacity per evening or per

boat of 125 jeeps or 75 ambulances or 50 two and one half ton trucks (R. p. 518). The Detroit and Cleveland Navigation Company is presently scheduled to move 600 two and one half ton trucks and 225 jeeps for the account of the Army with the understanding that this number will be greatly augmented as the season progresses. The present facilities of the Detroit and Cleveland Navigation Company are adequate to wholly take care of the automotive transportation needs of the Army between Detroit, Michigan, and Lake Erie ports (R. p. 519).

(E) Protestants' Equipment.

Fourteen of the vessels formerly owned by the Great Lakes Transit Corporation have been taken over by the Government in the prosecution of the war. Also taken over by the Government were the Steamers Fitch and one large passenger vessel of the Detroit and Cleveland Navigation Company. Five of the vessels of the Nicholson Universal Steamship Company were bought by the United States Maritime Commission (R. p. 391).

The Nicholson Universal Steamship Company is presently operating nine vessels in transportation activities on the Great Lakes, including the Steamers Hewitt, Sonoma, Penobscott, Coralia, Crescent City, Brown, Sultana, Sonora and Arthur Orr (R. p. 525). The vessels Hewitt, Sonoma, Penobscott, Coralia and Crescent City are operated by the Nicholson Universal Steamship Company even though title thereto vests in the United States Maritime Commission. It is the intention of the Nicholson Universal Steamship Company to continue to operate the entire present fleet of nine vessels, on the Great Lakes, after the termination of the present war. Activities have already been undertaken to insure the reacquisition by Nicholson Universal Steamship Company of the five vessels presently owned by the United States Maritime Commission (R. p. 526).

Of material bearing on the question of protestants' automobile transportation facilities during the present abnormal periods and also after the culmination of the present war, is the statement of Vice President Hewitt of the Nicholson Universal Steamship Company, at pages 527–530 of the record, as follows:

"There has been a very material change on the lakes within the past few weeks. You will recall that during the last hearings, there was a great deal of discussion concerning the bulk cargo carrier situation. By that I mean, prior to 1940 the bulk cargo carriers were utilized for the transportation of automobiles.

"Q. (By Mr. Eisen.) You mean by that, do you not, that they were put on the spar decks of the bulk cargo carriers?

"A. (By Mr. Hewitt). Yes, sir.

"The automobile carriers under charter arrangements had the spar decks of the bulkers made available to them for the transportation of automobiles. This of course gave us a large pool of vessel space. These bulk cargo carriers always considered themselves exempt from regulation under the theory that they were contract haulers. Because of the pending water legislation in Congress which finally took the form of Part III of the Interstate Commerce Act, the bulkers were hesitant about carrying automobiles on their spar decks because of the theory that such carriage would jeopardize their claim that they were contract carriers, and therefore exempt from regulation. For this reason there were no automobiles carried on outside bulkers. We of course carried automobiles on the spar decks of our bulker fleet.

31 "In March of this year the Interstate Commerce Commission, by its decision in the Columbia Transportation Company contract carrier application, Docket W-773, caused a complete change in the situation. In that decision the Commission found that the Columbia Transportation Company, and others in a like category, were common carriers in the transportation of commodities generally, except of course where they transported commodities in bulk in full cargo lots for one shipper. To the extent that the bulk cargo carriers have been found to be common carriers, there is no longer any danger of automobile transportation on the spar decks affecting their status. As a result of that decision, we have contacted several of the bulk cargo carriers and negotiated with them for the carriage of automobiles on their spar decks, when and as automobiles are again manufactured and transported.

"I can say that we have found a very receptive attitude on the part of the bulk carriers. As a matter of fact, our handling with one of the larger carriers has gone beyond the negotiation stages, and has practically reached a final settlement, the only thing that is left being the drawing up of the formal contract. This particular arrangement will make available to us a fleet of not less than ten boats. In addition to this one particular fleet, we have under way negotiations with other bulkers, and, all in all, we are pretty sure of having available to us when automobiles start moving, not less than thirty boats, with a reasonable certainty of more boats than will actually be required for the transportation of automobiles throughout the year, including the peak periods.

"Right here, when I refer to peak periods I am of course referring to the peak periods of the past. I do not know, and I doubt whether anybody knows, if there will be peak periods in the future, or how and when automobiles will be manufactured and tendered for transportation after the war. My own personal opinion is

that for a good many years the manufacture will be stabilized without changeover of automobile production, and that automobiles will roll off the assembly lines without the hills and valleys as shown on the transportation charts included in the previous exhibits in this case.

"Q. Now, Mr. Hewitt, do you have any other statement that you desire to make for the record?

"A. The Nicholson Universal Steamship Company is known as a specialized carrier of new automobiles, and, with the cessation of hostilities, the Nicholson Universal Steamship Company intends to see that, for such tonnage as may be offered to it for transportation over the Lakes, vessels are available to adequately handle such tonnage which may be offered.

"Q. Do you believe that you will be in a position to make available to the trade, the shipping trade, all of the facilities that will be required during the post-war period?

"A. We do, yes, sir. We feel that we will be able to take care of the situation as it may unfold from month to month, or from year to year, as well in the future as we have in the past."

(F) Shippers' Testimony

(1) Automobile Manufacturers

Applicants again presented as witnesses three representatives of the traffic departments of automobile manufacturers. These witnesses again unequivocally admitted that they possessed no information as to when their companies would go back to the commercial production of passenger automobiles. They had no knowledge concerning the quantity of automobile vessels that would be available for transportation if and when their companies resumed passenger automobile production. They had absolutely no knowledge of what the transportation conditions might be upon the return of normalcy. They had no knowledge of what the needs of their companies would be as related to the number of ships or ship carrying capacity that might be required after the termination of the war. They had not the slightest knowledge of the post-war shipping program being planned for the Great Lakes by the ship owners and operators. All that they could say was that they would like to see the applicants granted operating rights, for no other causes apparently, than personal reasons (R. pp. 429, 432, 433–435, 444).

(2) Automobile Dealers

Two automobile dealers, engaged in the handling of Chrysler products and possessing intimate contacts and relationships with

their field of endeavor, for approximately the past ten years, testified that it is the dealer and not the traffic department of the manufacturer that routes passenger automobiles. The
32 dealer instructs the factory as to the method and manner of the transportation desired. The dealer, not the manufacturer, pays the freight charges (R. pp. 494, 501).

These witnesses, who represent the only individuals that have a real, rather than an academic, interest in the transportation of passenger automobiles, testified as follows, with respect to the nature of the service that they received in the past from the established existing common carriers:

"Q. (By Mr. EISEN.) In so far as your products and the service which you have received in your particular connection in the way of water transportation are concerned, would you say that, in your opinion, there was any need for any additional carriers in the field?

"A. (By Mr. HUGHES.) Why, I would answer that question by saying that we were taken care of promptly, and with good service.

"Q. (By Mr. EISEN.) Am I to construe that answer, then, Mr. Hughes, as meaning that you do not think there is a need for any additional service?

"A. Well, I would answer that as I did before, by saying that we had no hold-up of the cars, but on the contrary, they came through very promptly, right on schedule.

"Q. And the service was satisfactory?

"A. Yes, sir.

(R. pp. 496-497)

"Q. (By Mr. EISEN.) Now, what have you to say, Mr. Feder, with respect to the service which you received during 1941 from the Nicholson Universal Steamship Company?

"A. (By Mr. FEDER.) It was very satisfactory.

"Q. Did you have any delays, or any hold-ups?

"A. No.

"Q. Did you have any serious complaints?

"A. None.

"Q. Or any complaints of any nature whatsoever?

"A. No.

"Q. Now predicated upon your own experience in 1941, in so far as your own particular business needs were then concerned, do you know of any reason why any additional boats or boat lines were or are needed to carry automobiles?

"A. Not for our needs, no, sir" (R. p. 502).

It is interesting to note that the testimony submitted by Mr. Feder, last above quoted, relates to a dealer, who in 1941 sold 7,000 automobiles and shipped over 5,000 thereof by water, all via the

facilities of the Nicholson Universal Steamship Company (R. p. 501).

(G) Position of the Protestants

(1) Nicholson Universal Steamship Company

The position of the Nicholson Universal Steamship Company is typified by the following statement appearing on page 530 of the record made by Vice President Hewitt, which should be read in conjunction with the abstract of his testimony, reproduced in Section E of the Abstract of Evidence hereof:

"The Nicholson Universal Steamship Company is known as a specialized carrier of new automobiles, and, with the cessation of hostilities, the Nicholson Universal Steamship Company intends to see that, for such tonnage as may be offered to it for transportation over the lakes, vessels are available to adequately handle such tonnage which may be offered."

(2) The Detroit and Cleveland Navigation Company

The position of the Detroit and Cleveland Navigation Company is clearly enunciated by the testimony of General Manager James McMillan, here reproduced from pages 538 and 539 of the record:

"The company has in the past always supplied the trade with sufficient equipment to take care of the existing needs, and it fully intends to do likewise after the conclusion of the war. At the present time we are operating the steamers Greater Detroit, Eastern States, Western States, City of Detroit III, and City of Cleveland III. These vessels are all combination package freight and passenger vessels, and are all capable of transporting automobiles. In the past we have carried automobiles on these vessels, and it is our current intention to restore the former facilities for the benefit of the shipping public.

33 "Q. (By Mr. Eisen). Do you mean, the former automobile carrying facilities?

"A. (My Mr. McMillan). Yes, sir.

"Q. Making available after the war facilities equivalent to your former facilities——

"A. Yes.

"Q. Prior to the outbreak of the war?

"A. Yes, sir. In 1941 we operated six combination passenger and freight vessels, and in addition, four freight vessels exclusively, for the carriage of new automobiles.

"Q. And it is the intention of your company to make such facilities, or equivalent facilities, available, as they may be required after the cessation of the present hostilities—is that correct?

"A. Yes, sir."

(3) The Great Lakes Transit Corporation

The Great Lakes Transit Corporation has not abandoned its transportation business and intends to actively resume when ships again become available. This line has been in operation as a common carrier of freight on the Great Lakes since 1916. It has filed for "grandfather" rights in Docket No. W–154 and action of this Commission, protecting that line's "grandfather" rights, despite an interruption in service which resulted from causes beyond the control of that carrier, is anticipated. That line submits that "its existing 'grandfather' rights are entitled to protection against the permanent competition of another carrier operating under temporary rights only because former operators are prohibited from engaging in business by a governmental mandate" (R. p. 447). The following abstract from pages 467–468 is here enlightening:

"Q. (By Mr. SULLIVAN). Now Mr. Foster, in his cross examination of you, has sought to indicate here that it might take a considerable length of time to build ships of the type that you might desire. In that interim, as in any interim, would it not be the policy of the company to charter temporarily as a makeshift?

"A. (By Mr. EMBLIDGE). Oh, yes.

"Q. When new ships must be built?

"A. Yes; that is correct.

"Q. At least, that is your hope?

"A. Yes, sir. We intend, just as soon as the war is over, to reestablish the service in some form, shape or manner, at the earliest possible date because we realize that we will have to get back into it very quickly."

(H) Additional Proof of Public Convenience and Necessity

The only real reference to anything that may be considered as proof, offered by the applicants either pro or con their contention of public need for their services is the following, abstracted from pages 479–480 of the record:

"Mr. FOSTER. We filed an application in this matter before we even got into the war, with respect to the sale of fourteen vessels (of the Great Lakes Transit Corporation) most of which apparently were lying at the dock doing nothing.

"Mr. EISEN. Because there was not enough business."

Extensive argument is here unnecessary. The Commission has already found, by Division 4, that these applications should be

denied and dismissed. Applicants requested a further hearing to submit proof of alleged changed conditions. If anything, the further hearing clearly and inexorably sustains the finding of the majority of Division 4 herein.

Upon all the facts of record and with full consideration of the law applying hereto the Commission should affirm the action of Division 4, which dismissed the instant applications.

Respectfully submitted.

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210 Wayne Street, Detroit, Michigan

and

CHARLES E. LEWIS,
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For Detroit and Cleveland Navigation Company.

S. S. EISEN,
140 Cedar Street, New York 6, New York,
For Nicholson Universal Steamship Company.

AUGUST 4, 1943.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties to this proceeding by mailing a copy thereof to each party of record.

Dated at New York, N. Y., this 3rd day of August 1943.

S. S. EISEN.

35 *Exhibit E to Complaint*

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-592

Application of T. J. McCarthy Steamship Company for a Certificate to Operate as a Common Carrier in the Transportation of Property Between Ports on the Great Lakes

Docket No. W-729

Automotive Trades Steamship Company (Application to Operate as a Common Carrier by Water)

PETITION FOR REOPENING, RECONSIDERATION AND POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

Opening Statement

The decision of the Commission in the captioned proceeding, decided March 7, 1944, entirely misconstrues the facts and the law applicable, in such a manner as to jeopardize the stability of both past and future regulation of not only water carriers but motor carriers as well. It is of the greatest importance, therefore, that this proceeding be reopened, and certain glaring errors in the close decision (there are four dissenting votes) be corrected.

Because of the nature of the majority opinion, it is necessary to treat, in this brief, with certain fundamentals of carrier regulation and also to extensively quote from the Act.

(A) The statutory requirements for the issuance of a certificate of public convenience and necessity

Section 309 (c) of Part III of the Interstate Commerce Act states:

"Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

The language of Section 309 (c) is clear and unambiguous. It provides that a certificate shall be issued if the proposed service is or will be required by the present or future public convenience and necessity. No mysticism attaches to the word service. It connotes exactly what it is intended to mean and in Section 309 (c) it refers to transportation operations.

There is nothing in Section 309 (c) (the only section with which we are here concerned), that would permit the certification of a boat or vessel. The certificate issues only to the applicant, a common carrier as defined in Section 302 (d), when, as and if the applicant proves that it is fit, willing and able to provide the proposed service and secondly, that the proposed service is or will be required by the present or future public convenience and necessity.

The term public convenience and necessity has been dealt with by this Commission on many past occasions. It will suffice, in defining that term, to utilize the Commission's own terminology:

36 "An applicant is not required to show that there may be urgent need or necessity for his services before he may be granted a certificate. The words 'convenience' and 'necessity' are used conjunctively and are not synonymous, but must be given separate and distinct meanings. That 'necessity' must be somewhat liberally construed is supported by decisions of the Commission and the Supreme Court. The question is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need, and whether it will endanger or impair operations of existing carriers, contrary to the public interest." Pan-American Bus Lines Operation, 1 MCC 190, 202, 203; Minneapolis Van & Warehouse Company Common Carrier Application, 6 MCC 477, 480.

Justification for the use here of the Commission's verbiage under the Motor Carrier Act is set forth in subdivision (B) hereof.

Bearing in mind the requirements of Section 309 (c) as above, it is appropriate to view the findings of the Commission, in this proceeding, which precipitated its conclusions:

In discussing the testimony of witnesses offered in support of the applications the Commission sums up such testimony (sheet No. 4) in this language—"In substance, it is that applicants' vessels were essential to the transportation of automobiles from Detroit to Lake Erie Ports in the past, that it would not have been possible without them for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941 and that they will again be needed when normal production of motor vehicles is resumed."

Again on sheet No. 4 it is stated—"In view of the large number of vessels which have been withdrawn from service on the Great Lakes since the original hearing, there is present need for the use of applicants' vessels from Detroit to Lake Erie Ports."

Again on the same sheet it is stated—"The witnesses, however, were of the opinion that applicants' vessels will be needed in the transportation of automobiles between the last mentioned Ports when the manufacture thereof is resumed."

On sheet No. 5 it is stated—"Thus, prior to the cessation of the manufacture of motor vehicles for civilian use, applicants' vessels were extensively utilized in the transportation of such vehicles."

On sheet No. 7 the following appears—"The record establishes that there was a definite need for applicants vessels in the trans-

portation of motor vehicles between Detroit and Lake Erie Ports prior to the cessation of the manufacture of motor vehicles for civilian use. It also shows with reasonable certainty that there will be a like need for them in that service at the termination of the war or when normal production and shipment by water of motor vehicles for civilian use are resumed."

Continuing on sheet No. 7 we find the following—"Witnesses representing manufacturers producing the bulk of the automobiles at Detroit testified * * * that in the absence of applicants' vessels it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941, and that with the resumption of automobile manufacture the use of applicants' facilities (undoubtedly referring to the three vessels owned by the applicants but operated by the Detroit & Cleveland Navigation Company) will be necessary in the handling of such traffic."

From the foregoing it is apparent that the Commission arrived at its conclusions that the certificate should be granted because there was need for the applicants' vessels in the transportation of motor vehicles in the past. Reference to Section 309 (c) indicates that a certificate will be issued if the proposed service is shown to be required "by the present or future public convenience and necessity." Nowhere therein is it stated that proof of past need will suffice. Reference to present and future need of course is irrevocably connected with need for transportation service. It is not sufficient proof, no less proof, satisfactory to the statutory requirements, to show need for any particular vessel.

We realize that the Commission, in innumerable proceedings has held that "operations over a considerable period of time in certain circumstances constitute some evidence that there is a need (present or future) for the service," but "the record must also show that the available facilities of the other (motor) carriers between the considered points are inefficient or inadequate to meet the needs of the interested shippers." North South Freightways, Inc. Extension—General Commodities, Docket No. MC–77365 (Sub. No. 4), decided March 24, 1944, mimeographed, citing McCoy Truck Lines, Inc., Ext. 26 M. C. C. 585.

37 Without exception, the rule adopted by the Commission of giving consideration to past operations as affecting present and future need has been confined wholly to instances where the past services were performed by a past recognized carrier who was also the applicant in the same proceeding. In this instance the past services were not performed by the appli-

cants but by the Detroit & Cleveland Navigation Company. How can it be said that the past services of the Detroit & Cleveland Navigation Company establish need for the proposed services of the applicants herein? Obviously so to hold would create an anomalous situation fraught with great danger and possessing potential power to undermine effective carrier regulation.

It is a fundamental precept of administrative law that the conclusions of the Commission must be supported by the evidence. There is not a word in the record or in the report and order of the Commission herein that justifies a finding that present or future public convenience and necessity require the issuance of a certificate to the applicants. We admit that predicated upon the fallacious syllogism projected herein by the Commission, the fallacy of which is established in subsequent sections hereof, and utilizing the erroneous premise that had these vessels of the applicants not been available in the past the existing common carriers would have made no effort to replace them and would not in fact have replaced them, the only conclusion that can be derived, which in and of itself must be fallacious because it is based on an erroneous premise, is that the use of the applicants' vessels in the past was essential and necessary in the public interest. Assuming that a finding of necessity for the past use of applicants' vessels can erroneously thus be made, does that in and of itself justify the issuance of a certificate particularly when it is evident that the certificate can bear no relationship to the facilities operated? If it does then the Commission has continuously erred in considering, in all past proceedings involving public convenience and necessity, the effect of the granting of the requested certificates on existing certificated carriers. In other words the statute does not provide that the boats are to be certificated—only the applicants are.

The statute does not demand proof that the specific boats be required at present or that they will be required in the future. The Act does, however, demand that there be unequivocal proof that the services proposed by the applicant are required at present or in the future. What showing is contained in the record of the need, present, or future, for applicants' services? That there is none is set forth in the subsequent sections hereof. It thus becomes apparent that the ultimate conclusions of the Commission, that present or future public convenience and necessity require the proposed services of the applicants, are made without supporting evidence.

The Commission's decisions cannot be sustained where the only reasonable deduction from the entire record and findings is that

the Commission has undertaken to support such findings, (a) by arbitrarily permitting only selected evidence to be considered, which selected evidence was so selected and considered because it, and it alone, would support the Commission's findings and (b) by arbitrarily and completely rejecting and refusing to consider all other evidence, solely because it conflicts with the desired Commission's findings. Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547–548; Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 227 U. S. 88, 91; The Chicago Junction Case, 264 U. S. 258, 263; Consolidated Edison Company et al. v. National Labor Relations Board, 305 U. S. 197, 229; National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 299; N. L. R. B. v. Thompson Products Inc., 97 F. (2d) 13, 15 (C. C. A. 6th, 1938).

While it is a fact that the Commission's conclusions will not be disturbed if there is substantial evidence to support those conclusions, this does not mean that the courts are not concerned where, as in this instance, the Commission reached wrong conclusions, by attributing to evidence, through wrong reasoning, substantial probative value which by right reasoning such evidence entirely lacks. Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 227 U. S. 88, 91; Western Paper Makers' Chemical Company v. United States, 271 U. S. 268, 270–271; Virginian Railway Company v. United States, 272 U. S. 658, 663, 665–666; Consolidated Edison Company et al v. National Labor Relations Board, 305 U. S. 197, 229.

It goes without saying that a finding without supporting evidence is beyond the power of the Commission. Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88, 92; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541.

Excluding from this record consideration of the controversial evidence and testimony which were directed wholly and solely toward showing that inasmuch as the vessels of the applicants were utilized by established carriers, in the past, for the
38 transportation of automobiles, there was thus a need for the use of those boats, particularly if they were not replaced by other boats, there is not a bit of evidence in the record that would justify a finding that there is present or future need for the proposed transportation services.

(B) Issuance of the certificate herein, predicated wholly upon a finding that there was a past need for applicants' vessels, both directly and indirectly does violence to previous findings of the Commission and the United States Supreme Court under comparable and similar circumstances and conditions.

The similarity of language incorporated in corresponding Sections of Parts II and III of the Act, pertinent herein, is striking. We here quote Section 203 (14) of Part II of the Act and Section 302 (d) of Part III of the Act:

Section 203 (14)—Part II	Section 302 (d)—Part III
"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property of any class or classes thereof for compensation,	"The term 'common carrier by water' means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation,
Whether over regular or irregular routes,	
except transportation by motor vehicle by an express company	except transportation by water by an express company
to the extent that such transportation has heretofore been	
subject to part I,	subject to part I,
to which extent such transportation shall continue to be considered to be	in the conduct of its express business, which shall be considered to be
and shall be regulated as transportation subject to part I."	and shall be regulated as transportation subject to part I."

We now quote from Sections 206 (a) and 207 (a) of Part II of the Act and Section 309 (a) and (c) of Part III of the Act:

Section 206 (a)—Part II	Section 309 (a)—Part III
"Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in	"Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part
Any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States	
unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations:	unless it holds a certificate of public convenience and necessity issued by the Commission:
Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made	Provided, however, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made
and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of	and has so operated since that time, (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event as to interruptions of service over which the applicant or its

Section 206 (a)—Part III

service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect.

And if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate.

Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such cer-

Section 309 (a)—Part III

predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect.

Pending the determination of any such application, the continuance of such operation shall be lawful, if the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly.

Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when

tificate shall be issued or denied accordingly.	this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application."
Pending the determination of any such application the continuance of such operation shall be lawful."	
Section 207 (a)—Part II	Section 309 (c)—Part III
"Subject to section 210.	"Subject to section 310."
a certificate shall be issued to any qualified applicant therefor, authorizing the whole	Upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole
or any part of the operations covered by the application, if it is found that the applicant	or any part of the operations covered by the application, if the Commission finds that the applicant
is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."	is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

40 The similarity of verbiage employed in Parts II and III is not merely accidental. Congress had the benefit of Part II of the Act when it wrote Part III. It not only had the ad-

vantage of the availability of the language of the Motor Carrier Act, then in effect, but also the Commission's and Court's interpretations of the pertinent portions thereof. That it chose to employ (in Part III the Act) not only like language but the exact language that was contained in Part II of the Act was and is inactive of a Congressional manifestation that similar interpretations be placed upon Part III of the Act as was theretofore accorded Part II of the Act.

We cannot impute to the Congress of the United States a lack of knowledge of the physical dissimilarities between motor vehicles and vessels. Congress cannot be accused of not knowing the disproportionate relationship of investments in individual motor carrier vehicles and maritime vessels. Neither can Congress be accused of lack of knowledge of the intrinsic attributes of motor truck transportation as compared or contrasted with water transportation. Nevertheless, notwithstanding all of these distinguishing features, Congress clearly indicated that the Water Carrier Act be accorded construction and application similar to that of the Motor Carrier Act. It did this by embodying in Part III of the Act the precise language theretofore contained in Part II.

It is erroneous for this Commission, or anyone else, to take the English language and apply two different interpretations to the same sentence or clause. In United States Navigation Co., Inc., vs. Cunard Steamship Co., Ltd., et al., 284 U. S. 474, the United States Supreme Court had before it the question of the interpretation to be accorded the Shipping Act, 1916, as amended by the Intercoastal Act, 1933. In dealing with the interpretation of the Shipping Act, 1916 which of course applied to regulation of water carriers possessing physical characteristics distinguishable from railroads operating overland, the Supreme Court said:

"The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. When the Shipping Act was passed, the Interstate Commerce Act had been in force in its original form or in amended forms for more than a generation. Its provisions had been applied to a great variety of situations, and had been judicially construed in a large number and variety of cases. The rule has become settled, that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, with certain exceptions not applicable here, that a remedy must be sought from the Commission before the jurisdiction of the courts could be invoked. In this situation the Shipping Act was passed. In its general scope and

purpose, as well as in its terms, that Act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect to the earlier act must be applied to the later one, unless, in particular instances there is something peculiar in the question under consideration, or dissimilarity in the terms of the Act relating thereto, requiring a different conclusion. (Pages 480–481)."

"The provisions of the Shipping Act clearly exhibit the close parallelism between that Act and its prototype, the Interstate Commerce Act, and the applicability to both of like principles of construction and administration. (Page 484)."

If the Shipping Act of 1916 can be termed the prototype of the Interstate Commerce Act, particularly in view of their divergence in language, then what must be said relative to the language of Parts II and III of the Act especially that portion above quoted?

In considering the matter of statutory interpretation it is of extreme importance that cognizance be taken of the reason why the administrative body has exclusive jurisdiction of matters involving administrative discretion. As stated by the United States Supreme Court in Board v. Great Northern Ry. Co., 281 U. S. 412:

"Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exaction and unjust discriminations must depend."

Of similar purport see Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247. It should be observed, from the above, that matters involving administrative discretion are non-justiciable by the Courts wholly because of the need for uniformity of construction interpretation and administration of the administrative laws. An anachronistic situation develops where the administrative body, itself creates the very discordance that was sought to be precluded, by according similar sections possessing precise language different and incongruous interpretations.

It must be concluded therefore that the interpretations, constructions and rulings, under the Motor Carrier Act, issued by this Commission and affirmed by the Courts must be given due and complete consideration in the administration of Part III of the Act.

While the Courts have held that they are not concerned with inconsistencies between the Commission's findings in a particular case and its findings in other proceedings, this is merely a recognition that the doctrine of stare decisis does not necessarily apply

to decisions of administrative bodies on administrative questions. However, it does not preclude the recognition that such inconsistencies may constitute cumulative evidence that the Commission's determination in the particular case was wholly arbitrary and capricious. Sprigg v. Baltimore & Ohio Railroad Company, 8 I. C. C. 443; The Commutation Rate Case, 21 I. C. C. 426; East Dubuque Supply Company v. Illinois Central Railroad Company, 28 I. C. C. 426, Commutation Fares to and from Washington, D. C. 35 I. C. C. 428; St. Louis-Missouri-Illinois Passenger Fares, 41 I. C. C. 584; Natchez Chamber of Commerce v. Louisiana & Arkansas Railway Company, 52 I. C. C. 105; Memphis-Southwestern Investigation, 55 I. C. C. 513; Natchez Chamber of Commerce v. Arkansas Harbor Terminal Railway Company, 58 I. C. C. 310; Interchangeable Mileage Ticket Investigation, 71 I. C. C. 200; Armour & Company v. Central of Georgia Railway Company, 81 I. C. C. 33; York Valley Lime & Stone Company, Inc. v. Pennsylvania Railroad Company, 186 I. C. C. 763; Passenger Fares and Surcharges, 214 I. C. C. 174.

The United States Supreme Court in United States et al. v. Rosenbloom Truck Lines, Inc., 315 U. S. 50, dealt with a situation comparable with that herein. In that proceeding the recognized common carrier augmented its fleet through the use of leased units. The lessors or owners of the vehicles which were utilized, operated and controlled by the established common carrier sought "grandfather" rights. Neither the Commission nor the United States Supreme Court dealt with the speculative proposition of whether (1) there was need for the leased units to move the tonnage that they actually moved; (It appears rather apparent that if the units were used to move the particular tonnage, they were needed to move that tonnage.) (2) no endeavor was made to speculate as to how the tonnage would have moved if the leased units were not available, and (3) no consideration was given to the investments of the owners in the leased units and the effect that the denial of the common carrier rights sought would have upon such investments. The Court, in affirming the denial of the certificate, said:

"We think it clear that Congress did not intend to grant multiple 'grandfather' rights on the basis of a single transportation service * * * the result would be to create in this case two services offering transportation to the public when there had been only one on the 'grandfather' date."

It may be urged that this is not a "grandfather" case and therefore should be distinguished from the Rosenbloom case. Such contention is wholly preposterous. What the Commission is here doing is creating, by indirection, two operations where only one previously existed. By finding that there was need for the vessels

to move the particular tonnage that they did, the Commission in effect, without treating with the question of present or future public convenience or necessity, creates two operations where only one previously existed. To try to differentiate the instant case and the Rosenbloom case because the latter was on the "grandfather" theory and, the instant case is on an extension theory is in effect to try to distinguish between tweedle-dee and tweedle-dum.

On sheet 7 of the proposed report it is said—"Refusal of applicants' right to initiate such operations with their own vessels might seriously impair their investment in those vessels and while that fact is not controlling, the refusal would according to this record deprive shippers of necessary transportation facilities which would not be in the public interest." Why were not the investments and the potential impairment thereof of the owner-operators under the Motor Carrier Act given consideration by this Commission if consideration of investments is to be a factor under Part III of the Act? Is it the amount of the investment, rather than the principle that is to govern? If so what is the line of demarcation? The public is entitled to know the amount of investment necessary before such consideration and protection will be accorded.

42 The cornerstone around which revolves the administration of the Motor Carrier Act was and is the principle enunciated in C. & D. Oil Co. Contract Carrier Application, 1 MCC 329, 332 as follows:

"We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed."

If the determination, indicated in the C. & D. Oil Co. Case, above quoted, is a necessary condition prerequisite to the issuance of a certificate of public convenience and necessity under the Motor Carrier Act, why should not the same rule of law apply to the same language incorporated in Part III of the Act? Nowhere in this record is there any evidence to support the conclusion that existing lines would not be prejudiced and materially hurt, financially and otherwise, by the encroachment upon their field, presently adequately served, by additional carriers. Additional carriers, particularly where there is no need therefor, place an added burden upon the transportation plan and as the Commission has heretofore found, are contrary to the public interest.

(C) There is no justification for assuming, as the Commission has, that if applicants' vessel had not been available to the established water lines in the past, others would not have been available for use

The applicants purchased their three vessels for the purpose of chartering them to the established common carriers. The applicants never desired to assume the obligations of common carriers. They chose to secure such benefits as were available to them through ownership rather than operation of the vessels and thereby free themselves of common carrier liabilities. They not only purchased the three vessels herein involved for that purpose but they entered into an arrangement with the Detroit & Cleveland Navigation Company, which irrevocably tied up the charter party with a solicitation agreement. Under the terms of the charter and solicitation agreements the Detroit & Cleveland Navigation Company was bound to use the vessels of the applicants rather than purchase its own boats or charter boats from other companies (R. p. 137). This is a clear indication that at the time the Detroit & Cleveland Navigation Company entered into the charter agreement with the applicants, there were other boats available to it.

The record does not indicate whether the charter or the solicitation agreement was the more desirable to the Detroit & Cleveland Navigation Company but consideration should be paid to the fact that they were closely and integrally entwined.

The record therefore conclusively establishes, and the record is the only basis upon which the Commission can predicate its conclusions or even assumptions, that in the past there were ample steamship facilities available to the established water lines. The record further establishes that insofar as the Detroit & Cleveland Navigation Company was concerned, it did not supply vessels in lieu of those of the applicants because it was precluded from doing so by contractual relations with the applicants.

Insofar as the Nicholson Universal Steamship Company was concerned, it did not provide facilities over and above the vessels it operated on the Great Lakes because there was no need for additional steamers. The Nicholson Universal Steamship Company's facilities were not utilized to anywhere near their maximum capacity. Exhibit No. 4 in Docket No. W-732, incorporated into this record by stipulation (R. pp. 321-325), clearly indicates that in 1940, for example, had sufficient automobile tonnage been offered, Nicholson Universal Steamship Company alone could have carried an additional 87,342 automobiles to Buffalo, New York, or an additional 174,685 automobiles to Cleveland, Ohio. The

Commission's report stresses the fact that in 1940 the applicants' vessels, operated by the Detroit & Cleveland Navigation Company, carried 77,741 automobiles or substantially less than the unused, available facilities of the Nicholson Universal Steamship Company.

It is unnecessary here to again reiterate the mass of factual data in this record which conclusively establishes the unused available carrying capacity of the Nicholson Universal Steamship Company during 1940 and 1941. The Commission is respectfully requested to review that matter, as set forth in detail on pages 11 to 14 inclusive of protestants' brief of March 21, 1942, and pages 13 and 14 of protestants' exceptions of June 29, 1942. Reference to those pages and the supporting underlying data of record, referred to therein, will conclusively establish that in the past Nicholson Universal Steamship Company was forced to curtail its automobile-carrying facilities because of the over abundance of vessel carrying facilities and the shortage of automobile tonnage, as compared therewith. Any conclusion made in this proceeding finding past need for the use of the applicants' vessels in the automobile trade, results from a complete disregard of the facts of record herein.

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(D) Peak Periods Are not Proper Criteria for the Issuance of Certificates of Public Convenience and Necessity

On sheet No. 5 of its report the Commission states:

"Prior to the war, the peak period for the movement of automobiles on the Great Lakes commenced in September or early October, with the production of new models. In 1940 and 1941, there were delays ranging from 2 to 4 days in the loading of the automobiles from the docks at Detroit incident to the congestion of such traffic and the inability of the water carriers to handle it promptly, which caused delays in delivery at final destination and resulted in numerous complaints from automobile dealers and distributors. Because of such delays, it was necessary at times to move by motortruck automobiles which had been previously delivered to the docks at Detroit for water transportation."

This is the only statement in the report directed toward the question of the proof of public convenience and necessity for the proposed operations. However, with respect to peak periods the Commission has already held in Cater's Motor Freight System, Incorporated, Extension of Operation.—Wenatchee, 10 MCC 292, 294:

"While we recognize the desirability of motor carriers making every effort to supply for the public a sufficient amount of equip-

meet to take care of every reasonable demand, we must also acknowledge that large financial investments are required if there is to be sufficient equipment to take care of the maximum demand that can arise under the circumstances of peak movements. On the other hand, if we were to authorize this applicant to enter the field, it would create no new business but would serve only to further divide the existing business during the entire period of movement. Public convenience and necessity refer to a demand that is reasonably constant and determinable rather than to the extraordinary peaks that may rise in the course of any business. The testimony shows that these peak periods are not reached more often than one or two days per month during a shipping season, and to a considerable extent such shortages can be averted if the shipper gives 24 to 48 hours' notice of the need for equipment. Our problems, therefore, becomes one of deciding between a group of carriers who are now adequately equipped to provide all of the service which is normally needed and an applicant which seeks, properly enough, to strengthen its own financial position by procuring additional tonnage. The demand occurs so irregularly that we cannot say that it is required by public convenience and necessity."

Many, if not the greatest number, of the complaints of delay during the peak periods were precipitated by faulty truck operations rather than water carrier activities (R. pp. 279-280, 298-299, 309). The difficulty appeared to be lack of synchronization in boat-truck operations at Buffalo, New York, in that the motor carriers did not have sufficient equipment to take care of all of the automobiles brought in, in boatloads. This resulted in accumulations at Buffalo. After the accumulations were disposed of, the Buffalo truckers were idle pending the arrival of the next boatloads (R. pp. 279-280, 309). The record does not indicate how additional boats rather than additional trucks could cure this situation.

(E) The Commission's Conclusions in this Case do Violence to Conclusions Heretofore Made Under Part III of the Act

Not only is the Commission's decision herein inconsistent with and repugnant to the law evolved under the Motor Carrier Act, as set forth hereinbefore, but it also is inconsistent with decisions of the Commission made under the Water Carrier Act.

In McLain Marine Corporation, Common Carrier Application, 250 I. C. C. 297 the applicant was granted a certificate even though it owned no floating equipment. It operated by virtue of chartered or leased facilities. To that extent its operations were

comparable with the operations of the Detroit & Cleveland Navigation Company insofar as they operated the vessels of the applicants herein. The Commission, however, made no determination in the McLain Marine Corporation case to ascertain the investment of the owners of the vessels so utilized by McLain. The Commission made no determination of the effect of such investments, of the grand operating rights to McLain without corresponding certification of the boat owners. Why is the situation in that case different from that herein?

Similarly, in Federal Materials Company, Inc., Contract Carrier Application, 250 I. C. C. 149, the applicant, an owner of vessels with a substantial investment therein and with a desire to operate subject to regulation of this Commission was denied operating rights because it did not conform with all the prerequisites of the Act. Why did not that applicant receive consideration comparable with the applicants herein?

In McCarren Towing Line, Inc., Contract Carrier Application, 250 I. C. C. 168, the applicant was denied operating rights even though it owned vessels because it did not conform with the requirements of the Act.

The applicant in Owens-Parks Lumber Co. Contract Carrier Application, 250 I. C. C. 206, was likewise denied operating rights even though it had substantial investments in vessels that would be impaired if operating rights were not issued to it.

In River Sand & Gravel Co., Contract Carrier Application, 250 I. C. C. 370, the application was dismissed without any consideration by the Commission comparable with that granted to the applicants herein.

In Bronx Towing Line, Inc., Contract Carrier Application, 250 I. C. C. 614, the applicant was denied a certificate and/or a permit, even though it had engaged in the chartering of its tugboats to other carriers. In denying operating rights the Commission said: "In such chartering of vessels, applicant is not engaged in transportation as a common or contract carrier as defined in Section 302 (d) and (e) of the act, and it need not obtain a certificate or permit to continue such operation. It has not chartered floating equipment to shippers. Under these circumstances applicant has not engaged in any transportation subject to Part III of the act in the chartering of vessels, and is not entitled to authority under Section 309 (f) to charter its vessels to others."

The applicant in the proceeding above occupied a position not a bit different from the applicants herein. The applicants herein need no authority to continue chartering their vessels to other carriers.

In National Barge Co. Contract Carrier Applications, 250 I. C. C. 806, in dismissing the applications because the carrier had theretofore engaged in the chartering of its vessels to other carriers, the Commission said:

"If there is need for applicant's vessels they are available, as in the past, for charter by the carriers who provide the whole transportation service."

In all of the above cases wherein operating rights were denied, the Commission conformed with the requirements of the Water Carrier Act in a manner consistent with its previous determinations under Part II of the Act. It did not consider extraneous and immaterial matters as it is doing here. It found, for example, in the National Barge Company Case, supra, that ownership of a vessel is not sufficient per se to permit the issuance of a certificate of public convenience and necessity. The Commission disregarded; and properly so, conjecture relative to investments of the ship owners in the vessels and the potential impairment thereof by the nonissuance of the certificate sought. Where the applicants, who were denied operating rights, performed charter services to carrier, in the past, the Commission held, and properly so, that such applicants could continue the activities in which they theretofore engaged, namely, ship, lease or charter to other carriers, without authorization from the Commission.

The applicant in this proceeding should be treated the same as have been all other applicants before the Commission under Parts II and III of the Act.

(F) The Commission misconstrues or disregards pertinent facts in its report and order

On sheet No. 4 of the proposed report it is stated:

"As the result of inquiries received by applicants at the time of the further hearing from a representative of the Army and from a common carrier of automobiles by motortruck, applicants expected to continue to transport motor vehicles from and to the same ports during 1943. Applicants state that they are prepared to transport motor vehicles not only from Detroit to Buffalo, but also from Detroit to the head of the lakes."

45 Again on sheet No. 6 it is said:

"This protestant (Detroit & Cleveland Navigation Company) has in the past transported automobiles on its combination passenger and freight vessels, and at the further hearing expressed the opinion that it would be able adequately to provide for the needs of the Army in the transportation of motor vehicles between Detroit and Lake Erie ports during 1943. The evidence shows,

however, that generally during the summer tourist season, extending from June to September, this protestant transports many passengers and their automobiles on its vessels, and in many instances there is little, or no, space available for other motor vehicles."

In its findings as above the Commission entirely disregarded or overlooked the pertinent facts of record with respect to this situation which we here reproduce from pages 10 and 11 of our brief on further hearing of August 4, 1943:

"The applicants were requested, by the Army, during 1942, to transport military vehicles from the port of Detroit, Michigan, to the port of Buffalo, New York. Those were the only ports that the applicants were able to carry automobiles from and to. Throughout the entire season the applicants handled twelve loads of automobiles to the port of Buffalo, New York, aggregating 950 vehicles (R. pp. 383–384).

"The applicants were requested, by the Army, to supply service for the transportation of military vehicles from Detroit, Michigan, to Buffalo, New York, wholly because of unavoidable contingencies which disrupted the automobile transportation service of the Detroit and Cleveland Navigation Company. In 1942 the Navy requisitioned the Steamer Greater Buffalo, owned by the Detroit and Cleveland Navigation Company, for conversion into an aircraft carrier. Prior to this action the Detroit and Cleveland Navigation Company maintained a nightly service between Detroit, Michigan, and Buffalo, New York (R. p. 516). The loss of the Steamer Greater Buffalo necessitated a revision of the existing schedule, reducing boat sailings from nightly service to three sailings per week. This action, of course, automatically and drastically curtailed the automobile carrying capacity of the Detroit and Cleveland Navigation Company between Detroit, Michigan, and Buffalo, New York (R. p. 517). This resulted in need for additional carrier facilities.

"For the 1943 navigation season the Detroit and Cleveland Navigation Company made arrangements for the operation of two vessels in the Detroit-Buffalo service and again is operating a nightly sailing. The Detroit and Cleveland Navigation Company has a present average carrying capacity per evening or per boat of 125 jeeps or 75 ambulances or 50 two and one-half ton trucks (R. p. 518). The Detroit and Cleveland Navigation Company is presently scheduled to move 600 two and one-half ton trucks and 225 jeeps for the account of the Army with the understanding that this number will be greatly augmented as the season progresses. The present facilities of the Detroit and Cleveland Navigation Company are adequate to wholly take care of the automotive transportation needs of the Army between Detroit, Michigan, and Lake Erie ports" (R. p. 519).

In view of this clear cut evidence of record it is improper for the Commission to give thought to conjecture relative to what might or might not have been or would happen under certain preconceived conditions. The actual happenings are in the record.

(G) The Case of Arco Auto Carriers Inc. Extension-Kenosha-Racine, Wis., Referred to on Sheet No. 8 of the Report, Is not Applicable Here

The proceeding here in issue involves the efforts of new carriers who never engaged in transportation service in the past to secure certificates of public convenience and necessity. Such carriers, the applicants, merely engaged in leasing or chartering their vessels to other carriers. They never performed carrier service for the shipping public.

Contrasted with the situation of the applicants, the Arco Auto Carriers Case, referred to on sheet No. 8 of the Commission's order, involved an applicant seeking operating authority which, "duplicates in certain respects the authority already held by applicant" (Sheet No. 2). In other words, the applicant in the Arco Auto Carriers Case was a common carrier already possessing a certificate. It was merely seeking an extension of operating rights. Not only were the rights it was here seeking duplicated by its existing rights but, furthermore, as the Commission found therein

46 "The proposed service is incidental to applicant's principal operations by the driveaway method, in initial movements."

Certain of the authority the applicant sought was to transport, by the driveaway method, between the particular points for which applicant possessed truckaway authority. Other of the rights sought would permit the applicant to return rejected shipments and move back, to the plant, vehicles requiring repairs.

In the Arco Auto Carriers Case, the shipper testimony clearly established the need for the continuance of the applicant's service and the extension of the service the applicant was seeking. No testimony nor evidence purported to show need for any particular transportation vehicle. The Commission made no determination, nor was it interested in whether the applicant owned its equipment or leased it; whether the applicant had any investments in equipment or whether the investments would be impaired by the denial of the operating rights. As the Commission reported (Sheet No. 6):

"The need (for the applicant's service) expressed by this shipper for additional service is based upon the demand existing during

normal times and not upon the demand as affected by the national emergency."

Another shipper testified (Sheet No. 7):

"There is a need for the additional service which applicant proposed to render between the above-named points."

The Commission (also on Sheet No. 7), found:

"The authority sought for the operations * * * is requested so as to permit applicant to render shippers it is now serving a complete service in connection with the operations authorized by the certificate already granted."

"It also would permit applicant to continue operations which it has conducted over a period of years * * * no opposition is made to this particular part of applicant's proposed operations * * * the record is not convincing that a grant to applicant of authority to operate between Chicago and points in Missouri will affect adversely the operations of this (protesting) carrier."

Not only is there no comparison between the situation of the applicant in the Arco Auto Carriers Case, and the applicants herein in the factors set forth above, nor is there any comparable matter contained in the records of the respective cases. The applicant in the Arco Auto Carriers Case sought to round out its operations, sought to be in a position to render the shippers a more complete service and finally sought to continue operations which it was conducting as a common carrier. It did not seek permission to continue to use its trucks because they had been used in the past. It established that the services proposed, rather than the vehicles utilized, were necessary in the public interest.

In the Arco Auto Carriers Case, emphasis was placed upon the fact that the situations portrayed in the record depicting need for the proposed service were situations that existed before the present emergency and that would exist after the present emergency. The Commission's conclusions in the Arco Auto Carriers Case, as quoted on sheet 8 of the report and order herein, that:

"While the curtailment in the production of automobiles during the national emergency results in a temporary diminution in the demand for the transportation of such commodities, it has not been our policy to deny an application because of the changed conditions resulting from the war, if the evidence otherwise supports a grant thereof. Normal conditions including the demand heretofore experienced are bound to recur and applicant should not then be expected to incur the cost and delay of a further proceeding"

directly preclude a grant of operating authority here. In the instant case the Commission predicates its conclusions upon speculation, conjecture and abnormal wartime conditions. It is wholly

and solely on the basis of the abnormal wartime shipping conditions that the Commission would find present need for the applicants' services. It is wholly upon conjecture as to when protestants will be in a position to restore their prewar shipping fleet that the Commission finds the existence of future public convenience and necessity. How can the Commission's action in this case be made comparable with its statement of normal conditions, in the Arco Auto Carriers Case above quoted? Obviously the citation in the Arco Auto Carriers Case cannot, by any stretch of the imagination, be used to justify the action of the Commission herein. If anything it precludes it.

47 (H) The Commission's prognostications relative to the postwar situation are wholly conjectural, unsupported by the record and contrary to the evidence

On Sheet No. 7 of the report and order herein it is stated:

"Although the expectation of protestants is that considerable tonnage will be available at the termination of the war, there is admittedly much uncertainty as to the length of time that may be required to procure and place in operation on the Great Lakes additional vessels adapted to their needs. Replacement by protestant D. & C. Company of its combination passenger and freight vessels alone will not adequately meet the needs of this service when conditions become normal, for the reason that during a substantial part of the navigation season such vessels were used in the past, and doubtless will again be used, for the transportation of passengers and their automobiles, leaving them with little or no carrying capacity for other motor vehicles. So far as appears, this also was and will be true of the combination passenger and freight vessels operated by protestant Great Lakes Transit Corporation. At certain times during the period prior to 1942, there were insufficient vessels, including applicants' vessels, fully to meet the needs of shippers of motor vehicles and similar situations may likely arise at such times in the future after the war upon resumption of normal production of motor vehicles. As has been stated, applicants own three vessels which can be reconverted into motor vehicle carriers without much difficulty. The necessary materials and equipment for that purpose have been retained. It is their intention to so reconvert upon termination of the present emergency. Unquestionably the public interest will be adversely affected if, after the production of automobiles is resumed, protestants are delayed in acquiring the additional facilities which they indicate will be necessary to meet the increased demands for transportation."

It is to be noted that nowhere in the Commission's discussions of the postwar fleets of the protestants is mention made of the vessels of the Nicholson Universal Steamship Company. On Sheet No. 5, the Commission found that Nicholson Universal Steamship Company, at the time of the further hearing, operated nine vessels, title to four of them vested in Nicholson Universal Steamship Company and title to the remaining five was in the Government. Negotiations had already been instituted by the carrier to reacquire the five vessels at the termination of the war. The importance of the operations of the Nicholson Universal Steamship Company in the determination of the matter above quoted is of extreme importance, particularly when it is borne in mind that of the total number of automobiles shipped from and through the Port of Detroit, Michigan, in 1940, the Nicholson Universal Steamship Company, alone, carried fifty-two (52) per cent thereof (Exhibits Numbers 1, 2 and 3 in Docket No. W-732, incorporated herein by reference).

In the last sentence of the matter quoted above from sheet No. 7, the Commission refers to some delay in protestant's ability to meet the increased demands for transportation. In all fairness the Commission should likewise prognosticate (but it would have to also do so upon a record barren of supporting evidence), when automobile production will get under way and when that production will reach the stage where water transportation will be used in a quantity sufficient to utilize all of the vessel space available. This also requires a finding as to the quantity of automobile vessel space that will be available after the war. If protestants are to be delayed in acquiring water facilities, how long will they be so delayed?

If the war ends and automobile transportation reaches proportions that would require additional vessels, for example, in November, there would be no need to issue temporary authority, assuming that temporary authority was necessary, until the opening of the Lakes the following April or May. Then temporary authority could be granted for six months from the date of the opening of the Lakes. In other words, from a practical viewpoint under such contingency, the temporary authority would actually run for a period of five months of closed navigation and six months of open navigation or a total of eleven months. Is it the Commission's finding that the protestants will be unable to supply shipping facilities within that eleven-month period? If automobile production gets under way in a manner and under conditions that will require the bulk of the movement to occur via rail and sufficient tonnage is not offered to utilize the facilities of the existing boat lines, will the Commission revoke the authority it here seeks to grant to the applicants?

The above shows the controversial, conjectural nature of the determinative feature herein involved—will there be a need for additional carriers after the war? Such speculation as is engaged in by the Commission in this proceeding, certainly
48 is not the basis for the award of operating rights. The language of the dissenting minority succinctly states the errors of the majority opinion. It is worthy of repetition here:

"I dissent from this report to the extent that it finds that the future public convenience and necessity require the operation proposed by applicants. In my opinion there is no evidentiary support in the record for such a finding. The findings in the prior report of division 4, 250 I. C. C. 550, should be affirmed in all respects.

"The fact that applicants' vessels were used as they were to carry automobiles prior to the present emergency and may be needed for that service when the production of automobiles is resumed does not warrant the conclusion that there will be need for the operation of such vessels by applicants as a new carrier in the field. That will not increase the amount of service formerly provided. Those vessels may be operated as formerly by existing authorized carriers under charter. Adequate service has been provided by protestants in the past and there is nothing in the record to show that they will be unable to provide similar service in the future.

"All of the conditions set forth in the record are abnormal, due largely, of course, to the war. Most of the vessels, including those of applicants, formerly used in the transportation of automobiles on the Great Lakes have been converted for, and are being used in, the transportation of other commodities in connection with the war effort. It is indefinite as to how long present conditions will continue or whether applicants will be able to exercise the authority herein granted upon expiration of their existing temporary authority. In my opinion the decision of the majority is based upon too many assumptions and suppositions to be sound as a matter of law.

"After the war there undoubtedly will be a period of readjustment of the operations of many water carriers and the resumption of suspended operations in many instances will no doubt be delayed. In this or similar cases, if an immediate and urgent need for service exists, temporary authority to provide such service may be granted under the provisions of section 311 (a). However, any consideration which we may now give to the conditions above referred to does not afford a sound basis for the granting of certificates under section 309 (c) permanently authorizing the institution of new operations."

CONCLUSION

There really is no purpose in engaging in extensive argument herein. The issues are well defined. The Act is clear. The Commission's duties are apparent.

In closing, however, we do desire to direct attention to the principal factor which distinguishes this case from the "run of the mine" application cases.

The shipper testimony and evidence adduced by the applicants were not directed toward having additional service instituted nor for having additional carriers enter the field of transportation because of need therefor but rather for continuance in operation of certain specified transportation facilities, heretofore used and which existing carriers offer to supply immediately, or in the future, as need should arise. The Commission made no finding herein, because the record does not permit it, that (a) the service rendered by the existing carriers was inadequate nor (b) that there is need for an additional carrier, nor (c) that the instrusion into the field of an additional carrier will have no adverse effect upon existing carriers. The Commission here seeks to grant operating certificates merely upon a showing that certain leased vessels were utilized in the trade and that therefore there was need for those specific vessels in the past and accordingly there will be need for those specific vessels in the future. No other vessels, apparently, whether they be larger, faster or more adaptable to the trade, under the Commission's reasoning, would have sufficed or will in future suffice.

The Commission does not, however, here seek to certificate the precise boats which it finds were essential but rather an operating company which it has not found, because the evidence will not support such a finding, to be necessary in the public interest. It should not be overlooked that if the operating company is certificated, the precise vessels, the past alleged necessity for which precipitated the Commission's findings herein, may not be made available in the future. The certificate imposes no such requirement. There is no assurance that vessels, if any, the applicants will provide in futuro. On the other hand, the applicants, after the war, when boat tonnage conceivably will be plentiful and cheap, may supply so much as to put all established water lines, that have diligently served the public interest for the last decade, out of business.

49

Wherefore the Commission is respectfully requested to postpone the effective date of the certificate and order herein, to reopen

and reconsider this proceeding upon the record as made and after sound and due consideration to dismiss the applications.

Respectfully submitted.

NICHOLSON UNIVERSAL STEAMSHIP COMPANY,
By S. S. EISEN,
140 Cedar Street, New York 6, N. Y., For Protestant.

APRIL 19, 1944.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties to this proceeding by mailing a copy thereof to each party of record.

Dated at New York, New York, this 18th day of April, 1944.

S. S. EISEN, *For Protestant.*

50 *Exhibit F to complaint*

INTERSTATE COMMERCE COMMISSION

OFFICE OF CHIEF EXAMINER, WASHINGTON 25

No. W-592

T. J. MCCARTHY STEAMSHIP COMPANY, COMMON CARRIER APPLICATION

No. W-729

AUTOMOTIVE TRADES STEAMSHIP COMPANY, COMMON CARRIER APPLICATION

MR. WILLIAM F. PRICE,
Pope & Ballard,
120 South LaSalle Street, Chicago 3, Ill.

DEAR SIR: On June 10, 1944, you forwarded to the Commission copies of a petition for leave to file the petition of Detroit and Cleveland Navigation Company and Great Lakes Transit Corporation for reopening, reconsideration and postponement of the effective date of the order in the above proceedings.

From the enclosed copy of the Commission's order you will note that the Commission, on June 5, 1944, denied the petition of protestant Nicholson Universal Steamship Company for reconsideration of these proceedings. In view of the action by the Commission it will be assumed, in the absence of advice to the contrary on or before June 26, 1944, that the petition for leave to file the peti-

tion of the Detroit and Cleveland Navigation Company and Great Lakes Transit Corporation is withdrawn.

Very truly yours,

ULYSSES BUTLER,
Chief Examiner.

Encl.

51 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Answer of the Interstate Commerce Commission

Filed July 22, 1944

Now comes the Interstate Commerce Commission, one of the defendants above-named, by its counsel, and in answer to the averments of the complaint respectfully represents:

1. The averments of divisions I, II, III, and IV of the complaint are admitted.

2. As to division V of the complaint, the procedural facts as therein averred are admitted and in further answer to the other averments therein contained, insofar as they may be deemed material, reference is made to the report of Division 4 of the Commission dated November 25, 1942, and attached to said complaint as Exhibit B thereof.

3. As to division VI of the complaint, the procedural facts as therein averred are admitted and in answer to the other averments therein contained, insofar as they may be deemed material, reference is made to the report of the Commission of
52 March 7, 1944, attached to the complaint as Exhibit A thereof.

4. As to divisions VII and VIII of the complaint, it is submitted that the matters therein set forth are purely argumentative but that if answer be required reference is made to said report and order of the Commission of March 7, 1944.

5. The averments of the first paragraph of division IX of the complaint are denied.

The averment that the ultimate conclusions of the Commission as shown in its report of March 7, 1944, are unsound in law, contrary to the record, arbitrary, and capricious, are denied.

The other averments contained in division IX are purely argumentative.

6. The averments of division 10 of the complaint are admitted except that it is averred that said petitions of Detroit and Cleve-

laid Navigation Company and Great Lakes Transit Corporation, referred to therein, have now been denied by the Commission.

7. The averments of division 11 of the complaint are denied.

8. In further answer to the complaint, it is averred that in the proceedings under the applications referred to in the complaint, the plaintiffs as well as other parties of record were accorded a full hearing as provided by the Interstate Commerce Act; that in said hearings a large amount of testimony and other evidence bearing upon the issues involved was submitted to the Commission for consideration; that in said proceeding questions relating to said issues were submitted to the Commission for determination, including questions raised by the plaintiff in this cause, whereupon the Commission determined said issues and entered and served upon the parties to the said proceedings its report and order complained of herein; that said report and order contains the Commission's findings of fact and conclusions thereon upon the evidence aforesaid. The Commission further alleges
53 that each and all the findings and conclusions in said report were supported by the evidence.

The Commission further alleges that in making said report of March 7, 1944, it considered and weighed carefully in the light of its own knowledge and experience all of the facts and conditions called to its attention on behalf of the parties to the proceedings, including questions and matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order of March 7, 1944, was not made or entered either arbitrarily or capriciously or contrary to the relevant evidence or without evidence to support them; that in making said orders the Commission did not exceed the authority duly conferred upon it, and the Commission denies each and all the allegations to the contrary contained in said complaint.

Except as herein expressly admitted the Commission denies the truth of each and all the allegations contained in the complaint insofar as they conflict with the allegations herein or with the statements or conclusions contained in said report and order of March 7, 1944.

Wherefore, The Commission prays that the complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
DANIEL H. KUNKEL,
By Daniel H. Kunkel, *Attorney.*

DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
Of Counsel.

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54 CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above answer of the Interstate Commerce Commission upon each of the following counsel this 20th day of July 1944, by mailing them a copy thereof: Angell, Turner, Dyer & Meek, 2104 Dime Building, Detroit 26, Michigan; Pope & Ballard, 120 South LaSalle Street, Chicago 3, Illinois; S. S. Eisen, Esq., 140 Cedar Street, New York, N. Y.; Robert L. Pierce, Esq., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.; Foster, Yost & Lott, Penobscot Building, Detroit 26, Michigan.

DANIEL H. KUNKEL.
Daniel H. Kunkel.

55 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Answer of the United States

Filed July 24, 1944

Now comes the United States of America, defendant herein, and in answer to the complaint says:

1. Admits the allegations of paragraph I and of parts II, III, and IV of the complaint.

2. Admits the allegations of part V of the complaint, but for a more complete statement concerning the matters referred to therein refers the Court to the decision of Division 4 of the Commission attached to the complaint as Exhibit B.

3. In answer to part VI of the complaint admits the procedural facts therein averred. Admits that the Commission's report contains the language quoted in said part, but for a more complete statement concerning the matters referred to therein the
56 Court is referred to the report of the full Commission attached as Exhibit A to the complaint. For further answer admits that there was conflicting testimony as to whether there was need for applicants' operations between Detroit and Lake Superior ports but alleges that it is the function of the Commission and not of the courts to weigh such conflicting testimony and that there is substantial evidence to support the Commission's finding that there was public need for such service.

4. In answer to parts VII, VIII, and IX of the complaint admits that the Commission's conclusion is primarily based upon the facts set forth in part VII as well as others. The Court is

referred in this connection to the Commission's report (Exhibit B to the complaint) for a more complete statement of the reasons for its decision. For further answer denies that the findings made by the Commission in its report do not support its ultimate conclusion that the future public convenience and necessity requires the issuance of this certificate or that such conclusion is not supported by the evidence, is unlawful, contrary to the record, or arbitrary and capricious.

5. Admits the allegations of part X of the complaint except alleges that said petitions of Detroit and Cleveland Navigation Company and Great Lakes Transit Corporation referred to therein have now been denied by the Commission.

6. Denies the allegations of part XI of the complaint.

Wherefore, it is respectfully prayed that the complaint be dismissed.

ROBERT L. PIERCE,
Robert L. Pierce,
Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Attorney for the United States of America, defendant.

WENDELL BERGE,
Assistant Attorney General.

JOHN C. LEHR,
United States Attorney.

57 CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the attached answer upon each of the following counsel this 22nd day of July, 1944, by mailing them a copy thereof: Thomas R. Lott, Esquire, Foster, Yost & Lott, Penobscot Building, Detroit 26, Michigan; Daniel H. Kunkel, Esquire, Interstate Commerce Commission, Washington 25, D. C.; Angell, Turner, Dyer & Meek, 2104 Dime Building, Detroit 26, Michigan; Pope & Ballard, 120 South LaSalle Street, Chicago 3, Illinois; S. S. Eisen, Esquire, 140 Cedar Street, New York, N. Y.

ROBERT L. PIERCE,
Robert L. Pierce,
Special Assistant to the Attorney General.

58 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Petition for leave to intervene

Filed July 26, 1944

To the Honorable the Judges of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Comes now the T. J. McCarthy Steamship Company, a Michigan corporation, and the Automotive Trades Steamship Company, a Delaware corporation, and files this, their Petition for Leave to Intervene, in the within cause.

Interveners show:

1. That on or about July 3, 1944, plaintiffs filed their Complaint in the within cause, naming the United States of America and the Interstate Commerce Commission and interveners as defendants.

2. That is it the desire of interveners to be permitted to intervene in said cause and to file answer and participate in the said proceeding, although the proceeding is primarily one to enjoin
59 the order of the Interstate Commerce Commission and to permanently set aside the order of that Commission granting common carrier rights to interveners.

3. That interveners are, under the circumstances, proper parties to the litigation and should be permitted to intervene and file their answer to test the Complaint.

And your interveners will forever pray.

T. J. McCarthy Steamship Company
and
Automotive Trades Steamship Company,
By T. J. McCarthy, *President*.

Foster, Yost & Lott,
Attorneys for Defendants, T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, 3466 Penobscot Building, Detroit 26, Michigan.

[*Duly sworn to by T. J. McCarthy; jurat omitted in printing.*]

60 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Order permitting intervention

Filed July 26, 1944

On reading and filing the petition of T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, de-

fendants in the within cause, for leave to intervene and file answer in said proceedings and participate in said cause, and

On Motion of Foster, Yost & Lott, their attorneys,

It is hereby ordered, adjudged, and decreed that the T. J. McCarthy Steamship Company and Automotive Trades
61 Steamship defendants named in the within cause, may intervene in said cause and may file their several or joint answer to the said complaint filed in said cause, and may otherwise participate in and be a party to said proceedings along with the Interstate Commerce Commission and the United States of America, the other defendants in said cause.

ARTHUR J. TUTTLE,
District Judge.

62 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Answer of the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company, defendants

Filed July 29, 1944

Now come the T. J. McCarthy Steamship Company, a Michigan corporation, and the Automotive Trades Steamship Company, a Delaware corporation, defendants herein, and in answer to the complaint say:

I

Admit the allegations of paragraph I and II of the complaint.

II

Admit paragraph III of the complaint except that portion which states that the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company are Michigan corporations. It is admitted that the T. J. McCarthy Steamship Company is a Michigan corporation, but further answering it is alleged that the Automotive Trades Steamship Company is a Delaware corporation.

III

Admit the allegations of paragraph IV of the complaint.

63

IV

Admit the allegations of paragraph V of the complaint, but for a more detailed summary concerning the matters alleged in said paragraph respectfully refer the Court to the decision of Division 4 of the Commission, attached to the complaint as Exhibit B.

V

In answer to paragraph VI of the complaint, admit the facts therein alleged, but respectfully suggest for a complete understanding and explanation of the quotation from the Commission's report that reference be had to the entire report attached to the complaint as Exhibit A. Further answering, defendants state that there was conflicting testimony offered at the original hearing and at the further hearing concerning the need for applicants' operations between Detroit and Lake Superior ports and allege that it is the function of the Interstate Commerce Commission and not of the Courts to consider such conflicting testimony. Further answering, it is alelged that there is substantial evidence in the record to sustain the findings of the Interstate Commerce Commission that there was public need for such service and that such service was in the public interest.

VI

In answer to paragraphs VII, VIII, and IX of the complaint defendants admit that the conclusion of the Interstate Commerce Commission was based upon the facts set out in paragraph VII of the complaint and upon the facts found by the Commission in its report, Exhibit A of the complaint to which reference is made. Further answering said complaint, these defendants deny that the findings made by the Interstate Commerce Commission in its report do not sustain its ultimate conclusion that the future public convenience and necessity require the issuance of this certificate or that the conclusion of the Interstate Commerce Commission is without support under the testimony as disclosed

64 by the record and that the same is unlawful, contrary to the record or arbitrary and capricious. Further answering, reference is respectfully made to the findings of the Interstate Commerce Commission, Exhibit A attached to the complaint, page 15, in which the Commission states:

"Refusal of applicants' rights to initiate such operations with their own vessels might seriously impair their investment in those vessels, and while that fact is not controlling, the refusal would, according to this record, deprive shippers of necessary transportation facilities which would not be in the public interest."

VII

Admit the allegations in paragraph X of the complaint, except that portion of the said paragraph which alleges that formal action of the Commission has not been received on the petitions of plaintiffs, Detroit and Cleveland Navigation Company and Great Lakes Transit Corporation. Further answering, it is alleged that the petition for leave to file a joint petition of those two companies has now been formally denied by the Interstate Commerce Commission and service of the Commission's order so denying the petition deserved upon said two plaintiffs has been had on the said two plaintiffs.

VIII

Deny the allegations set forth in paragraph XI.

Wherefore defendants respectfully pray that the complaint be dismissed.

T. J. McCarthy Steamship Company,
Automotive Trades Steamship Company,
By T. J. McCarthy, *President.*

Foster, Yost & Lott,
By Sparkman D. Foster,
Attorneys for Defendants
3466 Penobscot Building, Detroit 26, Michigan,
Telephone: CAdillac 3236.

65 [*Duly sworn to by T. J. McCarthy; jurat omitted in printing.*]

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the attached answer upon each of the following counsel this 29 day of July 1944, by mailing them a copy thereof: Robert L. Pierce, Special Assistant to Attorney General, Department of Justice, Washington, D. C.; Angell, Turner, Dyer & Meek, 2104 Dime Building, Detroit 26, Michigan; Daniel H. Kunkel, Esquire, Interstate Commerce Commission, Washington 25, D. C.; Pope & Ballard, 120 South LaSalle Street, Chicago 3, Illinois; S. S. Eisen, Esquire, 140 Cedar Street, New York, New York.

Sparkman D. Foster,
Sparkman D. Foster,
Attorney for Defendants.

66 In the District Court of the United States for the Eastern District of Michigan, Southern Division

DETROIT AND CLEVELAND NAVIGATION COMPANY, A MICHIGAN CORPORATION, GREAT LAKES TRANSIT CORPORATION, A NEW YORK CORPORATION, AND NICHOLSON UNIVERSAL STEAMSHIP COMPANY, A DELAWARE CORPORATION, PLAINTIFFS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, T. J. McCARTHY STEAMSHIP COMPANY, A MICHIGAN CORPORATION, AND AUTOMOTIVE TRADES STEAMSHIP COMPANY, A MICHIGAN CORPORATION, DEFENDANTS

Bill in Equity to Enjoin, Set Aside, and Annul an Order of the Commission

Opinion Filed September 29, 1944

Before SIMONS, Circuit Judge; TUTTLE, and O'BRIEN, District Judges.

SIMONS, Circuit Judge. The plaintiffs are common carriers of motor vehicles by water upon the Great Lakes, authorized as such by the Interstate Commerce Commission under § 309 (a) of the Interstate Commerce Act, and were protestants in hearings before the Commission upon the application of the defendant steamship companies, to operate as common carriers of motor vehicles between Detroit, Michigan, and ports on Lake Erie and Lake Superior. The hearings resulted in an order of the Commission granting a certificate of convenience and necessity to the defendants under § 309 (c) of the Act, and this order the plaintiffs now seek to enjoin, set aside, and annul. The case was submitted to a court of three judges in pursuance of § 47, Title 28, U. S. C. A., and it is stipulated that the cause is submitted as upon final hearing upon the record made before the Commission.

67 The court is fully advised in respect to the finality of factual determinations made by the Commission if supported by evidence, Merchants Warehouse Co. v. U. S., 283 U. S., 501, 508, and understands that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Mississippi Valley Barge Co. v. U. S., 282, U. S., 282, 286. The court is also aware of the basic purpose of the Transportation Act of 1920, in that "it recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines

involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit * * *. Texas & Pacific R. R. Co. v. Gulf, Colorado and Santa Fe R. R. Co., 270 U. S., 266, 277, also Texas & New Orleans R. R. Co. v. North Side Belt R. R. Co., 276 U. S., 475, 479. The court also assumes that the underlying purpose of the original Act is likewise the purpose of the amendment thereto made by the Act of September 18, 1940, covering water carriers and now incorporated as Part III, Chap. 12 of the Act.

Section 309 (a), being § 909 of Title 49, U. S. C. A., contains the so-called "grandfather clause," providing, in effect, that where an applicant for a certificate of public convenience and necessity was in bona fide operation as a common carrier by water on January 1, 1940, and continued in such operation to the date of the application, the applicant shall be entitled to such certificate as a matter of right.

68 Section 309 (c) provides that the Commission may grant such certificate also to any applicant fit, willing, and able to perform the service proposed, if such service will be required by the present or future public convenience and necessity.

Originally the applications of the defendant carriers were for certificates either under the "grandfather clause" of § 309 (a) or under § 309 (c), and sought authority as common carriers between Detroit and Lake Erie ports. Upon oral argument, however, before a division of the Commission, the applicants indicated that they also desired authority to serve ports on Lake Superior. Their applications under § 309 (a) were denied by the division on the ground that the applicants were not in bona fide operation as common or contract carriers by water on January 1, 1940. This finding was affirmed by the Commission. As to the applications under the provisions of § 309 (c), the division concluded that the evidence submitted was not sufficient to support a finding that present or future public convenience and necessity required operation by applicants, but upon hearing by the Commission an ultimate finding was made that the operations proposed will be consistent with the public interest and the national transportation policy declared in the Act, and notwithstanding protest that the order sought extended the scope of authority beyond the scope of the application, the certificate authorized included authority to serve Lake Superior ports.

69 The question of law submitted to the court is that the action of the Commission is not supported by evidence. The plaintiffs, however, rest their case upon the evidentiary findings of the Commission, and submit the proposition that these

findings do not support the ultimate finding and conclusion of the Commission as to public convenience and necessity. There is, therefore, no need for the court to give detailed consideration to the record made before the Commission, and we confine ourselves mainly to the facts developed in its report. These disclose that applicants' president, T. J. McCarthy, was affiliated with the D. & C. Company, in a soliciting capacity, for about 9 years prior to 1942; that from 1937 to 1942 two of his vessels were chartered by the D. & C. to transport motor vehicles from Detroit to Lake Erie ports, and a third vessel for the same purpose, was chartered during the 1940 and part of the 1941 season. All three vessels were originally bulk carriers but were later equipped to carry motor vehicles. Because of the cessation of manufacture of motor vehicles for civilian use, all three vessels were reconverted to bulk freighters prior to the 1943 navigation season. The applicants, however, have retained the equipment and parts originally installed, and are prepared to reconvert their vessels into motor vehicle carriers upon termination of the war. Meanwhile, some use had been made of their vessels for carriage of military vehicles to Great Lake ports during 1942, and similar shipments were in prospect for 1943 at the time of the hearing, such vehicles being carried on the spar decks while the vessels were being operated in bulk transportation.

70 At the time of the final hearing no vessels of the motor vehicle carrying type were in operation on the Great Lakes, and a large percentage of all types of vessels formerly so used had been requisitioned by the government and withdrawn from service on the lakes, although since then the applicants have advised the Commission that the government was returning to the plaintiff Great Lakes Transit Corporation, 4 of the 14 vessels of that carrier which had been requisitioned. The applications were supported by witnesses from motor manufacturing companies, the substance of whose testimony was that the vessels of the applicants were essential to the transportation of automobiles in the past, that it would not have been possible, without them, for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941, and that these vessels would again be needed when normal production of motor vehicles is resumed. There was also evidence that there had been some delay in the transportation of motor vehicles by water during the 1941 season. During the seasons 1939 to 1941, inclusive, the vessels of the applicants, chartered by the D. & C. Company, handled from 64 to 74 percent of the motor vehicles carried by that company prior to the cessation of their manufacture. The peak period for the movement of automobiles on the Great Lakes during those years,

commenced in September or early October, with the production of new models. In 1940 and 1941 there were delays ranging from 2 to 4 days in the loading of automobiles from the docks at Detroit, incident to the congestion of such traffic, and because of such delays it was necessary, at times, to move automobiles by motortrucks.

71 Before the discontinuance of the manufacture of motor vehicles for civilian use, the plaintiff Nicholson operated four vessels specially designed for the purpose of transportation of motor vehicles. Of these, one was converted during 1941 into a combination motor-vehicle and bulk carrier. It also transported automobiles from Detroit to Duluth on the spar decks of its 8 bulk carriers, but its vessels had not been operated to capacity for the transportation of automobiles. It gave evidence that there had been no delay in its shipments, and that its service was satisfactory. At the time of the hearing it operated 9 vessels, 5 of which were owned and operated for the federal government. It had, however, begun negotiations to reacquire these vessels at the end of the war, intending to reengage in the transportation of motor vehicles when their manufacture is resumed, and to make available adequate transportation for such tonnage as may be offered to it.

The plaintiff Great Lakes Transit Corporation, had been engaged in the transportation of passenger and freight on the Great Lakes for more than 25 years; one of its vessels was specially equipped to carry motor vehicles, and it had also transported such vehicles on its combination passenger and freight or package and freight vessels. It expects to resume transportation when vessels again become available, and to provide sufficient vessels to meet the needs of shippers. Since the hearing, four of its vessels have been returned to it by the government and it had advised the Commission that these vessels would be in operation before the close of the 1943 season.

Like the other plaintiffs, the D. & C. Company intends, as far as it is capable of doing so, to make its former facilities, or their equivalent, available for motor vehicles at the termination of the war. At the time of the hearing it was operating 5 combination passenger and package freight vessels, the government having requisitioned two others, one a combination passenger and freight vessel and the other an automobile carrier, and the charters on the three automobile carriers owned by McCarthy's companies had been canceled or relinquished.

72 Upon these evidentiary facts the Commission found that there had been a definite need for the applicants' vessels in the transportation of motor vehicles between Detroit and Lake

Erie ports prior to the cessation of the manufacture of motor vehicles for civilian use. It also found that there was reasonable certainty that there would be a like need for them in that service at the termination of the war, or when normal production and shipment by water of motor vehicles for civilian use was resumed. It based this ultimate finding upon the evidence of Detroit automobile manufacturers that such vessels would be needed in the future, not only in transportation between Detroit and Lake Erie ports but also between Detroit and Lake Superior ports, and that in the absence of applicants' vessels it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941, and that with the resumption of manufacture, the use of applicants' vessels would be necessary in the handling of such traffic. It also found that refusal of the applicants' right to initiate operations with their own vessels might seriously impair their investment in such vessels, and while such fact was not controlling, denial of the applications would deprive shippers of necessary transportation facilities, and not be in the public interest. Moreover, even though the protestants expected that considerable tonnage would be available at the termination of the war, there was much uncertainty as to the length of time that might be required to procure and place in operation on the Great Lakes additional vessels adapted to their needs; that replacement by the D. & C. of its passenger and freight vessels alone would not adequately meet the needs of the service for the reason that during a substantial part of the navigation season the vessels would again be used for the transportation of passengers and their automobiles, leaving little carrying capacity for other motor vehicles, and this would also be true of some of the vessels of the Great Lakes Transit Corporation. The three vessels of the applicants could be reconverted into motor vehicle carriers without much difficulty, because the necessary materials and equipment for that purpose had been retained, and it was their intention to reconvert upon termination of the emergency. The conclusion was therefore reached that the public interest would be adversely affected if, after production of automobiles is resumed, the protestants were delayed in acquiring additional vessels concededly necessary to meet the expected increase in the demand for transportation.

73 In respect to the finding of the Commission that the vessels of the applicants were needed to supply the needs of automobile manufacturers for transportation in the period '39 to '41, the plaintiffs point out that this finding can mean no more than that their carrying capacity was required, and not that the specific vessels belonging to the applicants were required.

This, the brief on behalf of the government and the Commission, appears to concede, in the statement, "The past extensive operations of these boats on Lake Erie, even though by the D. & C. Company, clearly showed that there was a public need for the carrying capacity represented by them." This interpretation of the Commission's finding being established, the point is now made that in the absence of any showing by the applicants that their vessels were the only vessels available to the carriers to meet the transportation requirements of the automobile companies beyond that furnished by their own vessels, and in the absence of a showing that the future needs of the automobile companies for such carrying capacity can be met only by the vessels of the applicants, there is no evidence to sustain the Commission's ultimate finding that the public's convenience and necessity requires a grant to the applicants of common carrier rights. To put it more plainly, they say there is a gap in the evidence not bridged by any other evidentiary finding which necessitates a conclusion that the Commission's determination is unsupported. With this we are compelled to agree. Not only is there no finding to the effect that if the D. & C. had not chartered the vessels of the applicants there was no other carrying capacity it could have acquired, but the record to which we are cited establishes the contrary.

74 When McCarthy was testifying as to his negotiations with the D. & C., he asserted that he had asked its Freight Traffic Manager, "if, in the event sufficient business was developed in accordance with an agreement we earlier had, would they not put on the boats that he had purchased rather than chartering more outside boats from some other company, and he said 'Oh, yes, they would.'" McMillan, General Traffic Manager of the D. & C. Company, testified that if they had not obtained the ships of the defendant companies "there were many other places they could have been readily obtained." There was to this statement no contradiction. It would seem to be clear, accepting the Commission's finding of future needs based upon the past need for carrying capacity, that the shipping tonnage available before the emergency will again be available when the emergency passes, even if we are not permitted to take judicial notice of the tremendous increase in the American Merchant Marine, in all categories, since the beginning of the war.

75 It must be remembered that with the single exception of the transitory delays which occurred at the peak of the 1940–41 seasons, the water carrier service accorded the automobile manufacturers by the plaintiffs, was entirely adequate, and, as was said in U. S. v. Rosenbloom Truck Lines, 315 U. S., 50 at 54, "It was the common carriers who offered the complete trans-

portation service to the general public and the shippers." The present applicants offered no such service, and it was on this ground that their application, under the "grandfather clause," was denied. Whether it is economical and in the public interest to expect or require water carriers to maintain, throughout the navigation season, the carrying capacity needed for the peak load in September or early October, we have no occasion to inquire, and the answer is within the competency and, if upon evidence, within the exclusive prerogative of the Commission. It must be observed, however, that the full carrying capacity of the three vessels of the applicants was utilized during the periods in question, and that the grant of a certificate of convenience and necessity to the applicants will not add to the total carrying capacity of carriers engaged in water transportation, anything beyond what was available during the periods of delay, and there is no showing that the applicants intend or are able to add to their tonnage when they become authorized as common carriers. If it is proposed that the applicants acquire additional capacity, it is but added demonstration that such tonnage is or will be available to existing carriers.

76 The effect of the Commission's finding and order is to introduce new and competing carriers into a field adequately served, without the definite need for the services being shown, and this collides with the clearly defined purpose of the Transportation Act already indicated. While in arriving at this conclusion we give no weight to the argument of plaintiffs that past need offers no basis for judgment of future requirements since the economic era which is to follow a world upheaval may be subject to circumstances that no one can foresee, and so is entirely conjectural, we likewise reject, as conjectural, the conclusion of the Commission that the public interest will be adversely affected if, after the production of automobiles is resumed, the protestants are delayed in acquiring additional facilities. This conclusion fails to take note of the period required for automobile manufacturers to reconvert their plants to civilian production—an interim which has given manufacturers, labor, and the public such grave concern, and the length of which, and its effect upon the national economy, has been so much a subject of public discussion that no court or administrative body can fail to take note of it. The effect of a denial of the application, upon the investment of the applicants in their vessels, is conceded by the Commission to be without controlling force. If we correctly understand the purpose of the Transportation Act, it is neither controlling nor even mildly persuasive, for, as we understand it, the

Commission, in considering an application, is concerned only with the public interest.

77 It is true that in U. S. v. Rosenbloom Truck Lines, supra, there was involved only an application under the "grandfather clause" of the Motor Carrier Act of 1935 (49 Stats. 543, 552, 49 U. S. C. 309 (a)), while here we are now concerned with an application for certificates as new carriers, but the order of the Commission and its finding of convenience and necessity, are so inseparably based upon the experience of the applicants in operating their boats under charter to an existing carrier, that the observation of the court, in the cited case, "the result would be to create in this case two services offering transportation to the public when there had been only one on the grandfather date," becomes apposite. It is true that the court added, "without allowing the Commission to determine if the additional service was in the public interest." Here the Commission did make that determination, but almost solely on grounds advanced in support of a certificate under the "grandfather clause."

We find ourselves, therefore, in accord with the four dissenting members of the Commission, including its chairman, when they say, "the fact that the applicants' vessels were used as they were to carry automobiles prior to the present emergency and may be needed for that service when the production of automobiles is resumed, does not warrant the conclusion that there will be need for the operation of such vessels by applicants as a new carrier in the field. That will not increase the amount of service formerly provided," and also when they say, "The decision of the majority is based upon too many assumptions and suppositions to be sound as a matter of law."

78 Upon the question of the Lake Superior rights proposed to be given to the applicants, it would appear that the plaintiffs were given sufficient opportunity to present proofs with respect to that issue even though it was not submitted to the Commission in the original applications. In view of the wide latitude accorded the Commission in regulating its procedure and freeing it of the technical requirements of pleadings and proofs, and the failure adequately to show prejudice, we are not persuaded that the order of the Commission, if valid, is too broad.

It follows from our discussion that the order of the Commission authorizing the defendant companies to operate as common carriers of motor vehicles between Detroit and ports on Lake Erie and Lake Superior, will be enjoined, set aside, and annulled, without prejudice, however, to the consideration of new applications

when automobile manufacture is resumed and the public interest in their transportation can be adequately appraised under a peace economy, and without prejudice to the continuance or renewal of temporary authority.

It is so ordered.

CHARLES C. SIMONS,
United States Circuit Judge.

ARTHUR J. TUTTLE,
United States District Judge.

ERNEST A. O'BRIEN,
United States District Judge.

79 In the District Court of the United States for the Eastern District of Michigan, Southern Division

Final decree setting aside and annulling report and order of Interstate Commerce Commission.

Filed Nov. 20, 1944

At a session of said Court held in the Federal Building, Detroit, Michigan, on the 20th day of November A. D. 1944.

Present: Charles C. Simons, Circuit Judge; Arthur J. Tuttle, District Judge; Ernest A. O'Brien, District Judge.

The above entitled case having come on for final hearing on August 28, 1944, before a three-judge court, as required by the Urgent Deficiencies Act of October 22, 1913, and the case having been heard upon the complaint, the answers of defendants thereto, the entire record before the Interstate Commerce Commission in the proceedings known as Docket No. W-592, "T. J. McCarthy Steamship Company, Common Carrier Application" and No. W-729, "Automotive Trades Steamship Company, Common Carrier Application," and the written and oral argument of counsel; and the Court on September 29, 1944, having filed an opinion in said case, it is this 20th day of November 1944,

80 Ordered, adjudged, and decreed, that in accordance with said opinion of the Court, the certificate and order of the Interstate Commerce Commission entered on March 7, 1944, in the above-mentioned proceedings, by virtue of which defendants McCarthy Steamship Company and Automotive Trades Steamship Company were granted permanent operating authority as common carriers by water of motor vehicles between Detroit,

Michigan, and ports on Lake Erie and Lake Superior, be and the same is hereby annulled and set aside.

CHARLES C. SIMONS,
United States Circuit Judge.
ERNEST A. O'BRIEN,
United States District Judge.

———,
United States District Judge.

81 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Petition for appeal

Filed Dec. 18, 1944

The defendants the United States of America and the Interstate Commerce Commission, and the intervening defendants T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, in the above-entitled cause, feeling themselves aggrieved by the final decree of the United States District Court for the Eastern District of Michigan, Southern Division, entered in said Court on November 20, 1944, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein said defendants consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference is made.

Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated December 18, 1944.

CHARLES FAHY,
Charles Fahy,
Solicitor General,
WENDELL BERGE,
Wendell Berge,
per R. L. P.
Assistant Attorney General,
JOHN C. LEHR,
John C. Lehr,
United States Attorney,

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ROBERT L. PIERCE,
Robert L. Pierce,
Special Assistant to the Attorney General,
For the United States of America.
DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
DANIEL H. KUNKEL,
Daniel H. Kunkel,
Attorney,
GORDON C. LOCKE,
Gordon C. Locke,
Attorney,
For the Interstate Commerce Commission.
SPARKMAN D. FOSTER,
Sparkman D. Foster,
Attorney,
For T. J. McCarthy Steamship Company and Automotive Trades Steamship Company.

83 In the District Court of the United States for the Eastern District of Michigan, Southern Division

[Title omitted.]
[File endorsement omitted.]

Order allowing appeal

Filed December 18, 1944

In the above-entitled cause, defendants having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final decree of this Court entered November 20, 1944, and having also made and filed an assignment of errors and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided,

It is ordered and decreed, That the appeal be, and the same is hereby, allowed as prayed for.

And it is further ordered, That petitioners other than the Interstate Commerce Commission, give bond in the sum of $200 as a cost bond.

And it is further ordered, That the Clerk of Court transmit to the United States Supreme Court, as part of the record herein, the original papers, in lieu of copies thereof, as may be designated by appellants' and appellees' praecipe for transcript of the

record filed pursuant to Rule 10 of the Revised Rules of the Supreme Court of the United States.

Dated Dec. 18, 1944."

ERNEST A. O'BRIEN,
United States District Judge.

84 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Assignment of errors

Filed Dec. 18, 1944

Come now the defendants the United States of America, the Interstate Commerce Commission, and the intervening defendants, T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, in the above-entitled cause, and file the following assignment of errors upon which they shall rely in the prosecution of the appeal to the Supreme Court of the United States herewith petitioned for in said cause from the decree of the District Court of the United States for the Eastern District of Michigan, Southern Division, entered November 20, 1944:

1. The court erred in holding that the evidentiary findings of the Commission do not support the ultimate finding and conclusion of the Commission as to public convenience and necessity.

2. The court erred in substituting its judgment for that of the Commission upon purely administrative matters.

3. The court erred in holding that the decision of the Commission is based upon too many assumptions and suppositions to be sound as a mater of law.

4. The court erred in holding that the effect of the Com-
85 mission's finding and order is to introduce new and competing carriers into a field adequately served, without the definite need for the services being shown.

5. The court erred in stating that "It would seem to be clear * * * that the shipping tonnage available before the emergency will again be available when the emergency passes," when the Commission had found that there was admittedly much uncertainty as to the length of time that might be required to procure and place in operation on the Great Lakes additional vessels adapted to the needs of plaintiffs.

6. The court erred in concluding that the Commission made its determination as to public convenience and necessity almost solely

on the grounds advanced in support of a certificate under the "grandfather" clause.

7. The court erred in holding as conjectural the conclusion of the Commission to the effect that public interest will be adversely affected if the protestants are delayed in acquiring additional shipping facilities after the production of automobiles is resumed.

8. The court erred in concluding that the order of the Commission was illegal and void and should be enjoined, set aside and annulled.

9. The court erred in entering the final decree of November 20, 1944.

10. The court erred in failing to find that the complaint was without equity.

11. The court erred in failing to dismiss the complaint.

Dated December 18, 1944.

CHARLES FAHY,
Charles Fahy,
Solicitor General,

86 JOHN C. LEHR,
John C. Lehr,
United States Attorney,
WENDELL BERGE,
Wendell Berge,
Per R. L. P.,
Assistant Attorney General,
ROBERT L. PIERCE,
Robert L. Pierce,
Special Assistant to the Attorney General,
For the United States of America.
DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
DANIEL H. KUNKEL,
Daniel Kunkel,
GORDON C. LOCKE,
Gordon C. Locke,
Attorneys,
For the Interstate Commerce Commission.
SPARKMAN D. FOSTER,
Sparkman D. Foster,
FOSTER, YOST & LOTT,
3466 Penobscot Building, Detroit, Michigan,
For defendants, T. J. McCarthy Steamship Company and Automotive Trades Steamship Company.

95 [Citation in usual form, filed Dec. 18, 1944, omitted in printing.]

98 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed Dec. 18, 1944

To the ATTORNEY GENERAL FOR THE STATE OF MICHIGAN:

You are hereby notified that the District Court of the United States for the Eastern District of Michigan, Southern Division, on December 18, 1944, filed and entered an order allowing an appeal by the United States and the Interstate Commerce Commission to the Supreme Court of the United States from a decree filed and entered on November 20, 1944, in the above-entitled cause, and that the citation signed by such Court on December 18, 1944, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and order allowing said appeal, defendants' jurisdictional statement pursuant to Rule 12 of the revised Rules of the Supreme Court of the United States, and the statement required to be served upon appellees by said Rule 12.

This notice is given to you pursuant to the provisions of U. S. Code, Title 28, Section 47a, enacted March 3, 1911, c. 231,
99 Sec. 210.

Dated December 18, 1944.

CHARLES FAHY,
Charles Fahy,
Solicitor General,
JOHN C. LEHR,
John C. Lehr,
United States Attorney,
WENDELL BERGE,
Wendell Berge,
Per R. L. P.,
Assistant Attorney General,
ROBERT L. PIERCE,
Robert L. Pierce,
Special Assistant to the Attorney General,
For the United States of America.

DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel,
DANIEL H. KUNKEL,
Daniel H. Kunkel,
Attorney,
GORDON C. LOCKE,
Gordon C. Locke,
Attorney,
For the Interstate Commerce Commission.
SPARKMAN D. FOSTER,
Sparkman D. Foster,
Attorney,
For T. J. McCarthy Steamship Company and Automotive Trades Steamship Company.

100 [Bond on Appeal for $200 approved and filed Dec. 18, 1944, omitted in printing.]

103 *Notice of filing bond on appeal omitted in printing.*

107 In United States District Court

[Title omitted.]

[File endorsement omitted.]

Praecipe for transcript of record

Filed December 18, 1944

To the CLERK OF THE ABOVE-NAMED COURT:

You will please prepare a transcript of the record in the herein entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint and exhibits attached thereto.
2. Answer of the Interstate Commerce Commission.
3. Answer of United States of America.
4. Intervention and answer of T. J. McCarthy Steamship Company and Automotive Trades Steamship Company.
5. Record before the Interstate Commerce Commission in No. W–592 and No. W–729, as introduced in evidence at the trial of the above-entitled cause.
6. Opinion of the Court, September 29, 1944.
7. Judgment entered November 20, 1944.

8. Petition for appeal.
9. Assignment of errors.
10. Statement of jurisdiction.
11. Order allowing appeal.
108 12. Citation on appeal.
13. Statement directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court.
14. Notice to the Attorney General of the State of Michigan.
15. Proof of service.
16. This praecipe.
17. Cost bond.

CHARLES FAHY,
Charles Fahy,
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SPARKMAN D. FOSTER,
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Attorney,
For T. J. McCarthy Steamship Company and Automotive Trades Steamship Company.

109 [Clerk's certificate to foregoing transcript omitted in printing.]

1 *Plaintiffs' Exhibit No. 1*

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-592

APPLICATION OF T. J. MCCARTHY STEAMSHIP COMPANY FOR A CERTIFICATE TO OPERATE AS A COMMON CARRIER IN THE TRANSPORTATION OF PROPERTY BETWEEN PORTS ON THE GREAT LAKES

Docket No. W-729

AUTOMOTIVE TRADES STEAMSHIP COMPANY (APPLICATION TO OPERATE AS A COMMON CARRIER BY WATER)

HEARING ROOM "A,"
INTERSTATE COMMERCE COMMISSION BUILDING,
Washington, D. C., Monday, September 8, 1941.

Met, pursuant to notice, at 10 o'clock a. m.
Before Charles B. GRAY, Examiner.

Appearances

F. C. Strickroot, 143 Griswold Street, Detroit, Michigan, appearing for Cadillac Cartage Company, Marine Division. J. M. Arnold, 210 Wayne Street, Detroit, Michigan, appearing for D. & C. Navigation Company. Sparkman D. Foster, 2440 Union Guardian Building, appearing for T. J. McCarthy Steamship Company, applicant, Detroit, Mich. S. S. Eisen, 140 Cedar Street, New York, N. Y., appearing for Nicholson Universal Steamship Company, protestants. Arthur R. Eldred, 143 Liberty Street,
2 New York, N. Y., appearing for Rail Carriers in Official Territory. Stanley Carpenter, 143 Liberty Street, New York, N. Y., appearing for Rail Carriers in Official Classification Territory. Frank W. Sullivan, 231 S. La Salle Street, Chicago, Illinois, appearing for Great Lakes Transit Corporation.

4 PROCEEDINGS

Exam. GRAY. Gentlemen, the Interstate Commerce Commission has set for hearing at this time and place Docket No. W-592, the application of T. J. McCarthy Steamship Company, to operate as a common carrier by water; and Docket No. W-729, application of Automotive Trades Steamship Company to operate as a common carrier by water.

Who appears for the McCarthy Steamship Company?

Mr. FOSTER. I appear for them, Mr. Examiner, Sparkman D. Foster.

Exam. GRAY. For both applicants?

Mr. FOSTER. Yes.

Exam. GRAY. Who appears for the protestants?

Mr. EISEN. S. S. Eisen for the Nicholson Universal Steamship Company.

Mr. FOSTER. Mr. Examiner, I would like to have it stipulated by the protestants that the testimony taken in the T. J. McCarthy Steamship Company case be used in the Automotive Trades Steamship Company case.

I mean the companies are asking for service over the identical routes. The companies are owned by the same interests but there are the two companies and they have both operated during 1939 and 1940 and since that time.

One is a Delaware Corporation and one is a Michigan Corporation.

5 Mr. ELDRED. Might I suggest rather than do that, that we consolidate the two cases in one docket and dispose of them in that manner, and any testimony taken in one case will apply in the other?

Exam. GRAY. Very well. I will hear both cases simultaneously.

Are there any other appearances?

Mr. ELDRED. A. R. Eldred and Stanley Carpenter, 143 Liberty Street, New York City, appearing in behalf of the rail carriers. We are protestants as to the two carriers.

Mr. SULLIVAN. Frank W. Sullivan for the Great Lakes Transit Corporation.

Mr. ARNOLD. J. M. Arnold, general freight agent, the Detroit & Cleveland Navigation Company.

Exam. GRAY. Any others?

Mr. STRICKROOT. F. C. Strickroot, the Cadillac Cartage Company, Marine Division, Detroit.

Exam GRAY. As protestants?

Mr. STRICKROOT. No; I just want to ask a couple of questions.

Exam. GRAY. Are all who have entered appearances registered practitioners before the Commission?

Mr. ELDRED. Yes, sir.

Exam. GRAY. And Mr. Eldred and Mr. Carpenter are both present?

6 Mr. ELDRED. Yes.

Exam. GRAY. In these cases on application the Commission will furnish no free copy of transcript.

Mr. Foster, will you make what presentation you care to?

Mr. Foster. Yes. We wish the record to show, Mr. Examiner, that the only person who served the company or their counsel with protests up to this morning was Nicholson Universal Steamship Company.

The first time we had any notice that these other parties were going to protest was at the hearing this morning. We don't know on what basis they are protesting or anything else. We have received no notice prior to this morning after the hearing opened that they were protesting.

Now, this is the application of T. J. McCarthy Steamship Company for a certificate as a common carrier between the ports of Detroit, Michigan, and Cleveland, Ohio, and Erie, Pennsylvania, and Buffalo, New York.

The T. J. McCarthy Steamship Company was organized in 1935; it is a Michigan corporation and has operated vessels between those ports since 1935 under various arrangements with the D. & C., the Detroit & Cleveland Navigation Company; sometimes on a profit sharing proposition; sometimes under charter arrangement; and the T. J. McCarthy Steamship Company has an agreement with Detroit & Cleveland Navigation Company for various automobiles moving between Detroit and the three other ports.

The vessel which the T. J. McCarthy Steamship Company has operated has been the George W. Mead.

The vessels which the Automotive Trades Steamship Company have operated have been the steamers Morris S. Tremaine and George Ingalls.

Those vessels all operated in 1939 and have operated continuously since that time except as the operations were interrupted by the usual ice conditions prevailing upon the Great Lakes during the winter months.

Exam. Gray. Let me ask you, Mr. Foster, are you going to be the witness for the applicants?

Mr. Foster. No; I was just making that statement before I called Mr. McCarthy to the stand.

Mr. Eisen. Mr. Examiner, before the first witness takes the stand, just as a matter of information and for the purpose of clarification, there was a petition or motion submitted to the Commission some time ago by the admission of a show cause order against the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company with respect to the propriety of their filing tariffs this year with the Commission.

No action was taken on that motion. I have been given to understand by the Commission that that petition or motion would be considered in the disposition of this proceeding; that is,

8 the disposition of that motion would be made simultaneously with the disposition of this proceeding.

Am I correct in my understanding?

Exam. GRAY. That is correct. The Commission notified Mr. Milton P. Bauman with whom I understand you are associated.

MR. EISEN. That is right.

Exam. GRAY (continuing). That no action would be taken on the joint protest filed but the matter would be regarded as a protest to the issuance of requested certificates; and a copy of that letter was sent to the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company.

MR. EISEN. I just wanted to eliminate any question of surprise or anything like that in the course of the hearing.

MR. FOSTER. No; we understood there would be on order of the Commission to show cause made until there was a final hearing.

MR. SULLIVAN. Further, Mr. Examiner, the letter which was sent at that time not only to Nicholson Universal and Mr. Bauman but to the Nicholson Transit Company stated that the motion will be considered in the nature of a protest.

MR. FOSTER. Well, that is quite agreeable. Protest to the granting of the right, I suppose.

Exam. GRAY. Is that all?

MR. FOSTER. That's all.

T. J. McCarthy, being first duly sworn, testified as follows:

9 Direct examination by Mr. FOSTER:

Q. Will you give us your name?

A. T. J. McCarthy.

Q. And where do you reside?

A. Detroit, Michigan.

Q. Are you connected with the T. J. McCarthy Steamship Company?

A. Yes, sir; I am.

Q. And in what capacity?

A. President.

Q. When was the T. J. McCarthy Steamship Company organized?

A. In 1935.

Q. Does the T. J. McCarthy Steamship Company own any vessels?

A. Owns the Steamship George W. Mead.

Q. Owns the Steamship George W. Mead. How long has the company owned that vessel?

A It has owned it since 1935 but had a charter in 1934.

Q Does the T. J McCarthy Steamship Company have a solicitation agreement with the Detroit & Cleveland Navigation Company?

A It has.

Q. Has the Steamer George W. Mead been operated in the transportation of automobiles between Detroit, Michigan, and Cleveland, Ohio, Erie, Pennsylvania, and Buffalo, New York, continuously since 1939?

A. It has.

10 Q. And being operated at this time?

A. Still working.

Q. Are you connected in any way with the Automotive Trades Steamship Company?

A. I am president of the Automotive Trades Steamship Company.

Q. And what if any vessels does that company own?

A. They own the Steamer Morris S. Tremaine and George Ingalls.

Q. And have those vessels likewise been operated in the automobile traffic between the ports mentioned?

A. In '39 or '40?

Q. '39 or '40.

A. Yes.

Q. Are they being so operated at this time?

A. Yes.

Q. The application in each of these cases was prepared under your direction?

A. Yes.

Q. And you are familiar with the contents of each of the applications and the data set out on the various exhibits?

A. Yes, sir.

Q. How many revenue calls were made by these companies' various ships during 1940 and up until the time of the filing of this application?

A. Up to the—from January 1, 1940, the date of application, to Cleveland, 78 trips with the Steamer George W. Mead; to

11 Buffalo, 78 trips, revenue trips; and Cleveland, 51 trips. On the Automotive Trades Steamship Company——

By Mr. ELDRED:

Q. Did you say 78 to Cleveland with the Mead, and then you said 51 again?

A. No; I didn't.

Q. Would you mind repeating those figures?

A. Cleveland, 78; Buffalo, 78; Detroit, 51; with the Steamer George W. Mead.

On the Steamers Ingalls and Tremaine, the Automotive Trades Steamship Company between Detroit and Cleveland and Detroit and Buffalo, between Buffalo and Cleveland, 117 trips to Cleveland; 176 to Buffalo; and 85 to Detroit; from the time January 1, 1940, to the filing of the application.

By Mr. FOSTER:

Q. In the spring of 1937 did the Detroit & Cleveland Navigation Company charter from T. J. McCarthy Steamship Company the Mead; and from the Automotive Trades Steamship Company, the Tremaine?

A. They did.

Q. And did that charter provide that the D. & C. might from year to year renew that charter?

A. The D. & C. had the option of renewing the charter each year by notification or order—on February 1st of each year of the exercise or non-exercise of their option to charter for the following year.

Q. Yes. And under the charter arrangement what ex-
12 penses in connection with the operation of these ships did you as owner bear?

A. The charter provides for both the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company to pay the cost of fitting out in the spring and lay-up in the fall of the year, materials, replacements and repairs of all kinds, and certain wages of the men previous to the time the D. & C. takes the boat over in the spring of the year putting in operation, and after the D. & C. turn the boat back until such time as the vessel was laid up.

Q. And on some of the so called ten-month men, the licensed personnel, in both the forward and after end, do the two companies assume part of that expense?

A. They do.

Q. Part of those salaries?

A. They do.

Q. Under your arrangement with the D. & C.?

A. Yes.

Q. And any orders which you receive from the Bureau of Marine Inspection & Navigation as to any changes, any structural changes which has to be done on those vessels, that is also the obligation of the owner in each instance?

A. To meet the requirements of the steamship inspection and insurance, that is an obligation of the owner.

Q. And that condition must be maintained by the owner
13 during the charter period?

A. During the charter period.

Q. Did each of these companies file tariffs prior to the 28th of February, in pursuance to the terms of the 1940 transportation Act?

A. They did.

Q. As common carriers?

A. As common carriers. Port to port rates.

Q. And those tariffs which are the respective companies' ICC numbers 1 to 9 are now on file with this Commission?

A. That's right.

Q. And the Detroit & Cleveland Navigation Company did exercise their option for the use of these vessels during the current season?

A. For this year; yes.

Q. And they likewise chartered the Steamer Ingalls on which they had no option?

A. Yes. They had no option. They chartered that this spring.

Q. And the situation is you are soliciting the new automobiles for the T. J. McCarthy Steamship Company and these vessels are all at this time operating in the transportation of automobiles and package freight, that is, steel and other products?

A. That is true with the exception that at the present moment due to seasonal model changes one of the vessels of the three is laid up that is, the Steamer Morris S. Tremaine is laid up

14 temporarily.

Q. And have you operated at least two of these ships continuously since the opening of navigation?

A. Yes; since the opening of navigation.

Q. Have either of the vessels made a trip to Erie, Pennsylvania, during the current season?

A. No.

Q. In the past there has been transportation into Erie, Pennsylvania.

A. Yes.

Q. And would you explain just why there was on various occasions transportation into Erie and why it is not a regular operation?

A. Quite frequently it is possible due to ice conditions at the eastern end of the lake, that is, the harbor at Buffalo and the lake west of Buffalo, it is impossible to get in with a vessel, but you can get into Erie sometimes two or three weeks earlier than you can to Buffalo. Those trips that are made to Erie are an emergency trip due to the fact that you can not get into Buffalo and the business is there and it saves quite a lot of time and expense for the eastern trucker.

Q. That is why you filed on rates to Erie, Pennsylvania?
A. That is the reason.
Q. Mr. McCarthy, when did you first become associated with the Detroit & Cleveland Navigation Company?
15 A. In 1933.
Q. And at that time what facilities did they have available for the movement of automobiles?
Mr. EISEN. I am going to object to that. This is a grandfather application of the T. J. McCarthy Steamship Company and I don't see what relevancy it has as to what facilities the D. & C. had, or any other line had. This is not a public convenience and necessity case at all. I think the testimony should be confined to the activities of the T. J. McCarthy Steamship Company.
Mr. FOSTER. I am leading up to that now.
Exam. GRAY. I will receive that subject to your objection.
The WITNESS. The D. & C. had six passenger vessels that they operated, had been operating for several years.

By Mr. FOSTER:

Q. How many of those passenger vessels operated between Detroit and Cleveland and Detroit and Buffalo?
A. Four, as a rule, an overnight boat from Detroit to Cleveland, and vice versa; and to Buffalo. The other two boats were used on another run, perhaps up-lake, something of that sort, but never more than four boats in the navigating season.
Q. In the Detroit & Cleveland Navigation Company were the automobiles such as they might carry on their regular passenger boats?
16 A. That's right.
Q. Now, these passenger vessels, did they at that time and do they still transport tourists' automobiles?
A. Oh, yes. A great many.
Q. And is the capacity for new automobiles on those vessels cut down considerably during the summer months?
Mr. EISEN. The same objection. I don't see what application that has as to the grandfather application of the T. J. McCarthy Steamship Company. I can not see what bearing that has on this proceeding, which is a grandfather application of T. J. McCarthy Steamship Company.
Mr. FOSTER. We think it has a very definite bearing on the whole situation as a background of the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company.
Exam. GRAY. It is leading up to the reason for the chartering of the vessels?
Mr. FOSTER. That's right.

Exam. GRAY. I will receive it.

Mr. FOSTER. Will you read the question?

(Question read.)

The WITNESS. During the tourist season which usually starts in June, until some time in September, the passenger vessels carry a great many tourists driving through who use the facility between Detroit and Cleveland and vice versa, to Detroit and
17 Cleveland, and the capacity for new automobiles is in a great many cases absolutely nil.

By Mr. FOSTER:

Q. And as the new automobile busines gradually developed, it was necessary to add new and further facilities?

A. That's right.

Q. By the handling of new automobiles?

A. Yes.

Q. And did you have an arrangement with the Detroit & Cleveland Navigation Company that as it was necessary to add these facilities, that you might add them?

A. That was in our original agreement.

By Exam. GRAY:

Q. While you were associated with the D. & C. Navigation Company?

A. While I was associated with the D. & C. Navigation Company. At the time I became associated with them.

By Mr. FOSTER:

Q. But your agreement with the Detroit & Cleveland Navigation Company was a percentage of the revenue. Is that right?

A. Percentage of the revenue, yes.

By Mr. SULLIVAN:

Q. Was your charter hire based on a percentage of the business?

A. No; the charter hire was based on the percentage solicitation.

By Mr. FOSTER:

Q. But previously one of your chartered boats did have that form?

A. That's right. It had a percentage of the gross revenue.

18 By Mr. EISEN:

Q. When what that, so we might have the record clear, what year was one of the boats chartered on a percentage basis?

A. I am not positive whether it was 1934 or early in 1935. I haven't the records with me.

By Mr. FOSTER:

Q. And in 1937 did the T. J. McCarthy Steamship Company enter into a contract with the Detroit & Cleveland Navigation Company for the solicitation of new automobiles similar to the contract which you had previously had as an individual?

A. Yes.

Q. And what was the length of that contract?

A. Until the end of 1942.

Q. Until the end of 1942. And it was at the commencement of the season or about that time in 1937 that the Detroit & Cleveland Navigation chartered one vessel from each of those companies?

A. Yes.

Q. And the charter contained an option that they might renew that charter from year to year for a period of five years?

A. That is correct. May I—the recollection comes back to me now, in the fall of 1936 the steamer Morris S. Tremaine was operated on a percentage basis also; and in 1937 both the T. J. McCarthy Steamship Company's Mead and the Automotive Trades Steamship Company Morris S. Tremaine were chartered to
19 the D. & C. on a charter hire.

Q. Has a considerable amount of money been spent to equip these boats especially for automobile and package freight?

A. Yes. They were originally bulk freighters. The bulk freighters—the work of conversion necessitated taking out bulkheads, putting in elevators between decks, tie-downs, in order to fit the vessels out to carry automobiles.

By Exam. GRAY:

Q. That was done with all three vessels?

A. The Steamer George W. Mead was fitted out for automobiles when I bought it but the other two were bulkers, the Tremaine and the Ingalls.

Q. While you are there, can you give us the capacity, car capacity of each ship?

A. Yes, the Steamer George W. Mead is approximately 250 cars, plus or minus 5 or thereabouts, depending on the size of the car or make of car; and the Morris S. Tremaine and the George Ingalls are each 400 car capacity boats.

By Mr. FOSTER:

Q. You have no way of knowing, Mr. McCarthy, from time to time, whether the Detroit & Cleveland Navigation Company are going to exercise the option on these vessels?

A. Nothing until February of the year for which—they have the right to exercise the option up to February 1st of the ensuing year. No advance notice is ever given.

Q. And you have received no notice from them at this time as to what their intentions are for next year?

20 A. No.

Q. Nor did you receive any notice last winter up until about the time that the option expired?

A. That's right.

By Mr. SULLIVAN:

Q. What is right?

A. That last year we didn't get notice until the option time had—option date had arrived.

By Mr. FOSTER:

Q. None of these vessels could be used for any other service without the expenditure of a large sum of money. Is that right?

A. That is absolutely so.

Q. Have you any idea, Mr. McCarthy, as to how many automobiles have been handled by the Detroit & Cleveland Navigation Company from the opening of the season up until, say, the end of August?

A. This year?

Q. Yes.

A. Approximately 75,000 new cars.

Q. Approximately 75,000?

A. 75,000 new cars.

Exam. GRAY. Please tell me when the season opened.

By Mr. FOSTER:

Q. When did the season open this year, Mr. McCarthy?

A. Rather early this year, in April. I can give you the exact date. This was an early season on the Great Lakes (ex-

21 amining paper). April 1st to Cleveland, and April 9th to Buffalo.

By Exam. GRAY:

Q. Can you give me—is there any usual month or date of opening and closing?

A. To Cleveland, usually the month of March, latter part of March; and to Buffalo, that is very, very indefinite but as a rule you can get into Buffalo some time around April, although there have been some winters of severe winds and adverse winds that blow the ice to the lower end of the lake. That is, it is well into May before navigation opens.

By Mr. FOSTER:

Q. And when do they go to Lake Superior ports?

A. I am not familiar with that. The insurance season starts, regular insurance season April 15th to November 30th, that is the

insurance season on the Great Lakes; and that would apply to Duluth and the upper lakes as well as Lake Erie.

Q. In order to operate prior to April 15th or after November 30th, is it necessary for you to obtain pre and post season insurance?

A. Yes; it is necessary to obtain higher premium rates insurance to cover your operation, post and pre season—pre season and post season.

Q. Mr. McCarthy, can you say approximately what percentage of this 75,000 automobiles have been transported on vessels owned by the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company?

A. Well, up to date I would say somewhere between 70
22 and 75 percent of the new cars that the D. & C. have handled have been transported on the three vessels under discussion, the Mead, Tremaine and Ingalls.

I have the figures totalled, not in percentage, however, but the total figures, if you care to have them.

Q. Do you have those figures available?

A. Yes.

Q. Suppose you give them.

A. The Steamer Morris S. Tremaine has carried to August 22nd 20,430 cars Cleveland and Buffalo.

The Steamer George Ingalls to September 2nd, 19,386 cars.

By Exam. GRAY.

Q. To Cleveland?

A. Cleveland and Buffalo, both ports.

And the Steamer George W. Mead to August 27th 14,731 cars.

By Mr. FOSTER:

Q. The three boats moved approximately 55,000 automobiles?

A. 55,000 of the 75,000 automobiles moved to date.

Q. Are you familiar, Mr. McCarthy, with the various companies, all of whom have protested here, are you familiar with their operations in the transportation of automobiles?

A. Yes; I think so.

Q. And with the capacities of their various vessels?

A. Yes.

Q. Would there have been enough automobile vessels to have moved this traffic on Lake Erie without the use of the
23 vessels owned by the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company?

Mr. EISEN. I am going to object once again, Mr. Examiner. It seems to me Mr. Foster is more and more bringing into this proceeding the question of public convenience and necessity. It has

not place in this proceeding. This is purely a grandfather proceeding. The only thing the application calls for is proof that the applicant was in bona fide operation during the grandfather period.

Beyond that testimony and proof and exhibits within the scope of this hearing, I must object very strenuously to any testimony about that.

Exam. GRAY. No; the application is for a certificate to operate as a common carrier and that I think justifies the showing of necessity for operation.

Mr. SULLIVAN. I have this further objection, Mr. Examiner.

Mr. Foster's question to the witness directs the witness to perform a function of the Commission. If he wants to put in the numbers and capacities of the various ships, that is different. It is for the Commission to reach the conclusions.

Exam. GRAY. It can be received as his opinion.

Mr. EISEN. There is no question of whether there is any other carrier. The question is whether this carrier was in bona
24 fide operation on January 1, 1940, and has continued to be so since.

What the other carriers are doing and have done has no bearing whatever on the rights of this applicant.

Mr. FOSTER. Mr. Examiner, I just can not agree with this narrow construction because all of these instructions to all of the applicants are to state in detail the particulars of the boats they had chartered and the boats they owned and had chartered to others.

Certainly your contention as to the scope of this application must be correct, because otherwise if these vessels would not be chartered at the end of the charter period someone who has been operating on this run would end up without any rights whatsoever. The charterer could just simply say, "I am sorry, I am not going to charter any more. I have chartered those boats and have used them but I am not going to charter them and of course you can operate them."

Mr. EISEN. Mr. Examiner, part 3 of the Act with respect to the issues here is an exact counterpart of part 2. And the Commission has already ruled with respect to the counterpart to the effect that the only proof in a grandfather application is the question of whether the applicant was in bona fide operation on the grandfather date and has so operated continuously without interruption.

The Commission has consistently refused in all hearings that have come to my attention, and I have read I think at
25 least 90 per cent, testimony in a grandfather hearing was limited to that.

I have run into the same thing a number of times when I represented the applicants and I have been curtailed and precluded from submitting public convenience and necessity data and have had to file a separate application.

I think the applicants in this proceeding have been placed squarely on notice as to the interpretation of that Act.

The application is a grandfather application and the only proof is that permitted in the section of the Act, and anything with respect to public convenience and necessity has no place in this hearing.

Exam. GRAY. Very well. I will overrule your objection, Mr. Eisen, and receive the witness' statement as his opinion as to the facilities on the lakes.

By Mr. FOSTER:

Q. Mr. McCarthy, you have given it as as your opinion that the automobiles that have been moved, could not have been moved without the service of the three vessels belonging to these two applicants. Will you state on just what you base that opinion?

A. Well, over a period of years there have been times when the automobiles have piled up on the docks even with more vessels in operation than there were last year; and it was necessary that we have another boat, or, that the D. & C. Navigation
26 Company last year and the year before, in order to move the volume of traffic offered; and it would seem that the necessity is proven by the fact that they have been in operation.

Q. And up until this year there were automobiles moved on the decks of the conventional boat carriers, were there not?

A. To Lake Erie ports?

Q. No; to up-lake ports.

A. Up-lake ports, yes, there were.

Mr. ELDRED. Now, we are getting way out of this scope.

Mr. FOSTER. No; we are not. I just wanted to show that some of the other automobile boats have now been by necessity operated on Lake Michigan and Lake Superior.

Mr. ELDRED. I move that that last answer be stricken from the record as irrelevant and incompetent to this proceeding.

Exam. GRAY. I will overrule the objection.

Mr. ELDRED. Note an exception, please.

By Mr. FOSTER:

Q. Do you know of your own knowledge, Mr. McCarthy, whether or not a large number of automobiles in the past up until this year were shipped to Lake Michigan and Lake Superior ports on the decks of automobile boats?

A. Yes.

Mr. SULLIVAN. You mean the decks of bulkers, don't you?
Mr. FOSTER. Yes.

By Mr. FOSTER:

Q. Do you know whether that practice has been
27 discontinued except on the decks of bulkers which the Nicholson Universal have under charter this year?

A. Yes. I don't know about Great Lakes Transit but I know the bulkers no longer carry automobiles on the decks except such as are operated by Universal and Nicholson.

By Mr. EISEN:

Q. Do you know of your own knowledge that the Nicholson ships automobiles on the decks, boats under charter?

A. Not as I understood it.

Q. You said under charter.

A. Will you please repeat your question?

Mr. EISEN. Have the reporter repeat Mr. Foster's question.

Mr. FOSTER. You can ask on cross-examination

Mr. EISEN. No, I object, then. I want to know if he knows the answer of his own personal knowledge. That was Mr. Foster's question.

The WITNESS. Ask the question, please, again.

The REPORTER (reading). "Do you know whether that practice has been discontinued except on the deck of bulkers which the Nicholson and Universal have under charter this year?"

The WITNESS. I would say yes, and may I qualify it by saying that I know in addition to the charter boats Universal and Nicholson operate they have some of their own bulkers up there that they own and they carry cars on the deck.

Mr. ELDRED. Mr. Examiner, might I inquire the theory of this line of testimony when the application here covers between
28 Detroit and Cleveland and Detroit and Buffalo? Why are we going up on the upper lakes in the testimony? What has that to do under any possible circumstance with this application?

Mr. FOSTER. If you will just wait a moment, I think I will develop it.

Mr. ELDRED. Well, no. I don't think we have any right to go all over the field here. We might as well go on the Atlantic Ocean as the upper lakes. We have here a definite territory. Now, if we can go on the upper lakes we can go on the Atlantic Ocean just as well.

By Mr. FOSTER:

Q. Mr. McCarthy, do you know of your own knowledge that all through 1940 the Minnesota-Atlantic Transit and the Nichol-

son Universal did use other bulkers in the transportation of automobiles to the upper lakes?

A. They did.

Mr. ELDRED. What has that to do with this application? We have definite territory that this applicant has applied for.

Exam. GRAY. It is my understanding that he is endeavoring to show that the practice of using the decks in the eastern lakes was discontinued.

Mr. EISEN. This whole testimony is as to the upper lakes. He hasn't testified about Lake Erie at all. That is the basis of the objection.

Mr. FOSTER. We want to develop it has been necessary to put regular automobile carriers on the upper lakes, eliminating Lake Erie as a result of it.

Exam. GRAY. All right. Develop that.

Mr. ELDRED. May I inquire what the witness meant by "other bulkers?" I didn't understand his answer. Other than what?

The WITNESS. Other than the ones that were under charter. The Nicholson Universal have some boats under charter, the Cornelius, Jr., and the Adam Cornelius. There are two Corneliuses. They owned the South Park, which was an automobile boat which has been converted to a bulker; and the Steamer Penobscot—both of which are bulkers now, but they do carry automobiles on the decks to the upper lakes.

By Mr. FOSTER:

Q. The Steamer South Park up to her recent conversion had been used primarily on Lake Erie, had she not?

A. Yes.

Mr. EISEN. I am going to object to that, to this witness testifying about that. We will put our own witness on. Let the witness testify about his own operations.

By Mr. FOSTER:

Q. Mr. McCarthy, there have been some movements of automobiles in 1939 and 1940 likewise between Buffalo and Cleveland, have there not?

A. Yes; there have been Ford and Chevrolet cars from the Buffalo plants to Cleveland.

Q. And both of these companies have moved some of those automobiles?

A. Both of those companies have moved some of those automobiles.

Mr. ELDRED. Do I understand the applicant is going to support these statements by documentary evidence as to the movements, when they occurred?

Mr. FOSTER. I had a long talk with Mr. Talmadge about that and if the Examiner decides the witness' testimony is not sufficient and the Examiner wants us to present exhibits, they will certainly be presented.

Mr. ELDREDGE. I will withdraw it.

Exam. GRAY. The objection has been withdrawn, Mr. Foster.

Mr. FOSTER. I think that's all.

Mr. EISEN. I have some questions.

Cross-examination by Mr. EISEN:

Q. Mr. McCarthy, I understand that your application is for common carrier rights, is that right?

A. That's right.

Q. Are you in a position to supply to the Commission documentary evidence showing transportation in the name of the T. J. McCarthy Steamship Company, billings by the steamship company covering the transportation you have just discussed?

A. No.

Q. Am I correct in my understanding that your company's whole request for grandfather rights is predicated entirely on the charter arrangement that you had with the D. & C.?

31

A. No.

Q. It is not predicated on the charter?

A. Not entirely.

Q. It is predicated on that and what else?

A. The fact that we assist in the maintenance of these boats, we assist in the scheduling of the boats, as to their movements, and in the operation of the boats.

Q. Well, then let me rephrase the question:

Am I correct in stating that your basis for requesting grandfather rights or common carrier rights is the relationship between the T. J. McCarthy Steamship Company and the Detroit & Cleveland Navigation Company?

Mr. FOSTER. I object to that question. We filed an application here and I don't think an applicant has to go into his theories of why he claims these rights.

Mr. EISEN. I didn't understand his case. I am asking upon what he is predicating his case. I am summing up his case and asking if that is his understanding of it.

Mr. FOSTER. I submit the question is wholly improper. He submitted his application and testified that his vessels operated on these routes and I say the question is wholly improper.

Exam. GRAY. No; I think the question is proper, Mr. Foster. The protestant does not clearly understand the application, he is trying to be informed.

Mr. EISEN. I don't, your Honor, and the witness states he has no documentary proof. I am trying to find out on what he seeks grandfather rights. I think I have that right. I think the Commission has the right——

EXAM. GRAY. Yes. You may proceed.

The WITNESS. And the ownership of the vessel under charter to a common carrier.

I am not clear as to just what my rights are.

By Mr. EISEN:

A. And it was on that basis that we filed our application, to find out just what our rights are.

We figure we are a common carrier and I think it is up to the Commission to decide whether we are or not.

Exam. GRAY. The Commission wants as much information as it can get about your operations.

By Mr. EISEN:

Q. I see.

Q. Have you chartered the vessels here under consideration to any person or carrier since 1937 when you entered into the charter arrangement with the D. & C.?

A. The Steamer George Ingalls was operated as a bulk carrier.

Q. Well, let me prefix my question. All of my questions apply only to automobile carriage. Then we won't be confused at all.

I am only talking about the transportation of automobiles.

A. Yes. No; we did not charter the boats to anybody else but the D. & C. Navigation Company.

Q. Am I correct in understanding your testimony, that with the opening of navigation you turn your vessels over to the Detroit & Cleveland Navigation Company for the transportation of automobiles?

A. That's right.

Q. When you turn your vessels over to the Detroit & Cleveland Navigation Company I presume the crew is hired to operate your vessels?

A. Previous to the vessel being turned out it is crewed and manned and ready to go.

Q. Now, when the Detroit & Cleveland Navigation Company takes over the vessels, who is the employer?

A. The Detroit & Cleveland Navigation Company.

Q. Does the Detroit & Cleveland Navigation Company pay the salaries of those individuals?

A. Yes.

Q. Does the situation of master and servant between them apply as to Detroit & Cleveland and the individuals?

A. That's right. There are certain parts of the salary in the fitting out and layout that are charged back to me.

Q. I am not talking about lay-over periods. I say as of the date the vessel is taken over to be put in operation. Now, who pays Social Security of those men, during the period
34 the vessels are operated?

A. From the time the D. & C. takes them over that is all taken care by the D. & C. Navigation Company.

Q. And who pays Workmen's Compensation?

A. D. & C. Navigation Company.

Q. Who pays officers' salaries?

A. D. & C. Navigation Company.

Q. Who stands such expense as the cost of fuels, oils and grease for the operation of the vessels?

A. D. & C. That is all in the charter.

Q. And who stands the expense of engineer supplies and steward's supplies—and such matters?

A. D. & C.

Q. And who pays the cost of towing such vessels if such towing is required?

A. D. & C.

Q. And who pays the cost and expense of upkeep during the period they are in operation?

A. D. & C. Navigation Company.

Q. And that includes the vessel itself, the machinery and boilers?

A. Except as to such things that may be required by the American Bureau of Shipping or the U. S. Steamboat Inspectors, during the lifetime of the charter.

Q. I mean if something goes wrong with the machinery
35 while the boat is in operation, who repairs it?

A. D. & C. Navigation Company.

Q. And who repairs the boilers if they blow while the ship is in operation?

A. We haven't had that happen.

Q. Well, isn't it a matter of fact that your charter specifically provides that the upkeep of the boilers and other appurtenances shall be taken care of by the D. & C.?

A. No; the charter provides during the operating season that we have the boat in condition; it has to be inspected by the government, repairs made and the boat in condition.

Q. I asked you in each instance during the time the boat is in operation. I didn't inquire anything at all about the lay-up period, I am only inquiring about the period the boat is in operation.

If the boat is in operation today between Buffalo and Cleveland and the boiler blows, does the D. & C. call upon T. J. McCarthy Steamship Company to repair that?

A. They might call upon the insurance company.

Q. That is not my question.

Mr. FOSTER. He said it never happened and he didn't know. You have the charter before you there apparently.

Mr. EISEN. Yes; I believe.

Mr. FOSTER. What do you see about boilers?

Mr. EISEN. It says the D. & C. will pay all costs of
36 maintenance and operation of such vessels including "without limiting the generality of the foregoing, such expenses as wages of licensed officers and of the crew, cost of fuel, oil, grease and engineers' supplies, and all supplies necessary or proper for the steward's department, supplies for the mate's department, towing expenses, repairs and upkeep of said vessel and equipment, machinery, boilers and appurtenances other than those which may be recoverable under the insurance policies."

The WITNESS. That is all in the charter, and that is correct.

By Mr. EISEN:

Q. If during the course of the operation of the vessels by the D. & C. during the period of open navigation any portion of the vessel is consumed, I presume, or misused, or requires replacement because of its use, is missing or damaged, isn't it a fact that the D. & C. must replace the used portion as well as the damaged or missing portions before the boat is returned to you?

A. Not as you state it.

Q. Well, you state it.

A. After 90 days after the vessel has been in operation each year, if any part of the vessel's equipment like lines, hawsers, cables——

Q. All right. I will take that from you.

A. That is my expense.

37 Q. In the event of any accident caused by or unto the steamers you charter to the D. & C. while under operation by the D. & C., can you or your company be held accountable for or does D. & C. agree to indemnify and save you from all such expenses or actions?

Mr. FOSTER. Mr. Examiner, I submit that is a legal conclusion and if he has the charter, it speaks for itself.

Mr. EISEN. I think the charter should have been put in.

Exam. GRAY. I think the applicant can answer the question.

The WITNESS. That wouldn't be a hundred percent D. & C. expense. It might be passed on to me under certain conditions.

Mr. EISEN. I submit in this connection, Mr. Examiner, this is the wrong claim. It is necessary to review the charter rather than just submit it because apparently the applicant has different ideas concerning the language of the charter which I think it might be good to clarify. I expect to introduce the charter through an appropriate witness later on but this clarification might help the record.

By Mr. EISEN:

Q. Now, will you clarify this statement which I read from the charter:

"It is understood and agreed, however, that the charterer will indemnify and save harmless the owner and steamer George W. Mead."

And the same clause appears in the other charters covering the other two vessels.

38 "Any and all claims."

I repeat: "Any and all claims arising out of the operation of such steamer of any nature whatsoever not covered by said policies of insurance."

Now, will you reconcile that statement with the statement that at times you are responsible?

A. Yes; by specific instances. Just very recently a requisition was put in by one of the captains for a life boat cover. The D. & C. rejected that and said that was up to the owner to supply because it should have had it on in the spring.

Q. Let me repeat my question: In the event of any damage due to collision or any cause in which the vessels of your company are participants while under the operation of the D. & C., are you ever responsible?

A. No. Not in case of collision. You were speaking about maintenance, as I understood it.

Q. No; no. I said damage. Now, are you aware of the fact that the Detroit & Cleveland Navigation Company has filed a grandfather application predicated on the precise operations of the vessels here involved in connection with which you are seeking the grandfather rights?

A. They have filed an application for grandfather rights.

Q. Predicated on the operations of the very vessels and very ports of call and trips that you have here enumerated?

A. We have submitted that; yes.

39 Q. Do you believe that the Commission should grant operating rights to both the owner and the charterer of the vessel?

A. The owner of the vessel has no guarantee of a charter after this year.

Q. Can you at any time during the period of navigation instruct or order the D. & C. Navigation Company to send that vessel to any specified port?

A. By agreement with them.

Q. By what?

A. By agreement between the operating men of the D. & C., and ourselves, we have agreed to send that boat to a certain port.

Q. Can you order?

A. Not personally, no.

Q. Can the applicant, either through you or an officer of the applicant, order the D. & C. to send the Steamer Mead, Tremaine or Ingalls to the port of Buffalo rather than the port of Cleveland?

A. No.

Q. Can you in any way, shape or form interfere with the operations of those vessels during the period of open navigation?

A. Do you mean help?

Q. No. Interfere. Order them to run more frequently or less frequently, order them to be tied up or not tied up?

A. No; that is all within their province.

40 Q. Have you any authority or can you exercise any control whatsovere over the vessels, the three vessels enumerated, during the period of navigation?

A. No.

Q. Have you in 1939 had that authority?

A. No.

Q. Have you in 1940?

A. No.

Q. Have you that authority today?

A. No.

Q. You stated to a question put to you by your counsel, I tried to take it verbatim—"Have you operated ships to these various ports since the opening of navigation this year?"

You answered yes.

How have you operated those ships when you have exercised no control over them? Will you please explain that?

A. Just that I perhaps misunderstood the question. I have not personally operated any ships.

Q. You mean you personally?

A. Me personally or T. J. McCarthy Steamship Company have not operated any vessels.

Q. When I speak about the Mead and T. J. McCarthy, the same questions would apply with full force to the steamers Ingalls and Tremaine?

A. The same questions that you have asked?

41 Q. Yes. The same questions and answers.

A. I would say yes.

Q. Now, just to clarify the record a bit, I think you said that you have had charter arrangements with the D. & C. as to the Mead continuously since February 1, 1939.

A. Yes.

Q. And you similarly testified as to that with respect to the Tremaine. Is that right?

A. That is right.

Q. And you similarly testified as to that with respect to the Ingalls. Is that right?

A. No.

Q. Well, you did, but I didn't think you meant to. Will you tell us the story with respect to the Ingalls?

A. The Ingalls was operated in—the fall of 1939——

Q. I am talking about automobiles only now.

A. Well, you asked me the question. I would like to answer it—as a bulk carrier in the grain trade, coal and so forth, to Lake Michigan and Lake Superior and it was converted in the spring of 1940 and was chartered to the D. & C. Navigation Company immediately upon the opening of navigation in 1940, and operated all during the season of 1940 by the D. & C. Navigation Company.

Q. As I understand your testimony also, Mr. McCarthy, the only time that you have had anything to do with the vessels
42 which are the subject matter of this proceeding was during the season of closed navigation, that is, from November 30th and through March of each year when the vessels were tied up and not in operation. Is that correct?

A. That's right.

Q. And during the period of open navigation when the vessels were in operation the only one that had control, supervision or direction thereover was the Detroit & Cleveland Navigation Company.

A. That's right.

Q. And in all instances, I presume—correct me if I am wrong—where the Detroit & Cleveland Navigation Company carried automobiles, irrespective of whether they were carried on the three vessels, the Mead, Tremaine or Ingalls, or the vessels of the Detroit & Cleveland Navigation Company, they moved under Detroit & Cleveland billings?

A. That's right.

Q. Now, in 1939, when automobiles were moved on the Great Lakes between ports involved in your boats or the boats of the Detroit & Cleveland Navigation Company, what tariffs or rates applied, whose tariff?

A. Lake Erie Tariff Bureau and D. & C. tariffs.

Q. By Lake Erie, do you mean an agency tariff?
A. Agency tariff.
Q. What boat lines participated in the agency tariff?
43 A. The D. & C. Navigation Company, the Nicholson Universal, the MAT Line, the Great Lakes Transit Company.

By Exam. GRAY:

Q. Does that mean the Minnesota-Atlantic?
A. Minnesota-Atlantic, yes. I beg your pardon.

By Mr. EISEN:

Q. Did the T. J. McCarthy Steamship Company issue or participate in any charter in 1939?
A. No.
Q. When did the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company first file tariffs?
A. This spring.
Q. This spring?
A. Yes, sir.
Q. Has any traffic, any automobile traffic, regardless of origin or destination, moved under rates published in those tariffs?
A. No.
Q. So those tariffs have never been used?
A. Never been used.
Q. Am I correct in my statement that in your activities for the Detroit & Cleveland Navigation Company you were only in the position of solicitor?
A. That's right.
Q. When you solicit automobiles for movement on the lakes, do you solicit to move by Detroit & Cleveland Navigation Company?
44 A. Yes.
Q. You don't solicit to move via T. J. McCarthy Steamship Company nor the Automotive Trades Steamship Company?
A. No.
Q. The T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company therefore never held themselves out to the public, as we understand it, to carry their automobiles?
A. No.
Q. And you still do not?
A. Still do not.
Q. You have had no indications, have you, that the D. & C. would not renew your charter next year?

A. They were offered an option to renew the charter on one of the boats for this year—for next year, but they declined to take an option.

Q. They declined to take an option or they declined to take it at this time of the year?

A. They declined to take the option to renew the charter next year, in the spring of this year, we were discussing.

Q. Did they ever renew the charter previous to February of the year involved?

A. Yes; they did.

Q. When?

A. What year?

45 Q. When.

A. I am not clear as to the year but they have indicated in the month of January that they would——

Q. It was either the month of January or February?

A. Yes.

Q. But never before that?

A. No.

Q. And you have no indications as to whether or not they will renew in January or February of 1942 for the year 1942?

A. No, sir.

Q. If the D. & C. does exercise its option and if we assume the Commission should grant the right you are here seeking, what vessels would you operate?

A. I should operate the "George W. Ingalls."

Q. Even if the D. & C. exercises the option?

A. They have no option after this year.

Q. But you couldn't exercise the "Mead" and you couldn't exercise the "Tremaine?"

A. No.

Q. So that both the D. & C. and the T. J. McCarthy Steamships would then operate between the same ports, carry the same traffic, all predicated on the same past operations which were conducted by the D. & C. Navigation Company?

A. It is not the T. J. McCarthy or the Automotive Trades Steamship Company.

46 Q. You mean it would be a new company that would operate?

A. That is possible—not a new company, I beg your pardon. But there is no charter or no option to renew on this "George W. Ingalls." She is going to be operated by somebody, it might even be the Nicholson Universal Steamship Company, I don't know; so it would be open to charter to whoever would want to operate, or we could operate if we are given rights.

Q. You mean if you are not given rights those boats would be chartered to someone who has the rights for automobiles?

A. That is what they are fitted out for.

Q. And if you do secure the rights, you will organize a new company and operate those very same vessels as a separate and distinct carrier?

A. No; I didn't say that.

Q. Well, what will you do?

A. I don't know what I will do.

Q. One other thing, you spoke about preseason and postseason insurance on vessels operated before or after the normal closing of the season. Who secures them that?

A. The D. & C. Navigation Company.

Q. I don't have a copy of the application, Mr. McCarthy. I wonder if you would mind telling me what percentage of the stock you own in T. J. McCarthy Steamship Company and in the Automotive Trades Steamship Company.

Mr. FOSTER. I don't think that is material, your Honor,
47 the percentage of stock this witness owns.

Mr. EISEN. Well, it is in the application.

Mr. FOSTER. It is not in the application.

Mr. EISEN. Well, I think the Commission would like to know it.

Mr. FOSTER. I don't see where it has any materiality whatever.

Exam. GRAY. The applications both state that the applicants are under common control. I think the record should show who exercises that control.

Mr. FOSTER. I think he can be asked whether another common carrier does but when you get into the percentage of the individuals who own it, I think it is getting beyond the scope.

Mr. EISEN. Mr. Examiner, if an individual operates two carrier corporations you have just a corporate veil there which should be brushed aside in a proceeding such as this.

Exam. GRAY. Well, the witness may answer or not, as he sees proper, but whether he answers or not, I want to know who has the common control.

The WITNESS. T. J. McCarthy personally owns 85 percent of the stock in the T. J. McCarthy Steamship Company and 80 percent of the stock in the Automotive Trades Steamship Company.

Exam. GRAY. That is the common control which was re-
48 ferred to in the applications?

The WITNESS. Yes, sir.

Mr. EISEN. That is all I have, Mr. Examiner.

Mr. ELDRED. No questions.

Exam. GRAY. Mr. Sullivan?

Mr. SULLIVAN. None for me.

Redirect examination by Mr. FOSTER:

Q. Mr. MCCARTHY, this insurance which is paid for by the Detroit & Cleveland Navigation Company during the season covers both the owner and the charterer?

A. Owner and charterer; yes.

Q. Did you ever make application, Mr. McCarthy, to be included in the Lake Erie Tariff Bureau?

A. Yes; I did.

Q. And to whom did you make that application?

A. To L. W. Patterson, agent for Lake Erie Tariff Bureau.

Q. When did you make that application?

A. It was early in February or late in January.

Q. It was prior to filing your own tariffs?

A. Prior to filing our own tariffs; yes.

By Mr. ELDRED:

Q. That is 1941?

A. 1941; yes.

By Mr. FOSTER:

Q. And were you permitted to participate in the Lake Erie Tariff Bureau?

A. No; they declined to let me participate.

49 Q. Now, the Detroit & Cleveland Navigation Company during 1939 and 1940 have operated ships owned by itself?

A. Yes.

Q. Over these identical routes?

A. Yes.

Q. So their application for grandfather rights does not rest upon the operation of the Tremaine, Mead and Ingalls?

Mr. EISEN. I object; this witness does not know. The D. & C. will establish, and I think the Commission's files will definitely establish that it does. That is something for the Commission to determine.

Exam. GRAY. The objection is sustained.

By Mr. FOSTER:

Q. But they have used and operated the vessels wholly owned by them in the transportation of automobiles between these very same ports?

A. They have.

Q. Now, as a matter of actual practice, Mr. McCarthy, who has scheduled and dispatched and figured out and directed the operation of these automobile boats as to where they would go and when they would go and which vessel would go where?

A. The agent of the D. & C. Navigation Company and myself.

Q. What was the situation with regard to as and when they would go out in the spring on their first trips?

A. When to have the boats ready to go out?

Q. Yes.

50 A. That was my decision. It was my—I never could get an exact date that they wanted to go but they always wanted the boats ready when it was time to go, but we would have to depend on the weather and ice and so forth, but they would never give me a specific date when they wanted the boat ready to go into operation.

Q. And whose decision was it as to when the vessel was actually to sail?

A. That was the D. & C. Navigation Company.

Q. And did they always consult and advise with you in that respect?

A. They always consulted and advised with me in that respect.

Q. Ever since you have had this arrangement with them the other traffic agents of the D. & C. have been advised and consulted with you as to scheduling and sailing of these vessels?

A. Yes; whoever was in charge of that work. It wasn't always the same man, in the past 10 years. They always consulted with me, where we would go, whether we would go to this port or that port. The decision was up to them, but I helped them work it out.

Mr. FOSTER. I think that's all.

Mr. EISEN. I have one question on a new matter raised by Mr. Foster.

51 Re-cross-examination by Mr. EISEN:

Q. You testified, Mr. McCarthy, that the Lake Erie Tariff Bureau declined to permit you to become a party to their tariff?

A. That's right.

Q. Was it indicated to you that the reason was they didn't consider you a common carrier?

A. No.

Q. What was their reason?

A. That the Nicholson Universal said they would withdraw from the tariff if I was included in.

Q. You or any other non-common carrier?

A. No. Just me.

By Exam. GRAY:

Q. Mr. McCarthy, you have testified that all your vessels have been refitted for the carriage of automobiles?

A. That's right.

Q. I take it from that that they are not suitable for carrying bulk cargoes.

A. No. Not without some reconverting of them back to their original condition.

Exam. GRAY. That's all. Any further questions of Mr. McCarthy?

Mr. STRICKROOT. I would like to ask one.

By Mr. STRICKROOT:

Q. On your Steamers "Meade" and "Tremaine" you will
52 handle package freight, rubber and steel; that has been handled by the Cadillac Cartage Marine Forwarding Division?

A. I don't know. I have never seen the bills of lading on the Marine freight.

Q. If the Cadillac Cartage Company offer you a hundred tons of merchandise and a couple of hundred tons of steel from Cleveland to Detroit could you handle it today?

A. No; I couldn't handle it today.

Q. If you receive this common carrier permit would you take up any vessel to carry it?

Mr. FOSTER. I think that would depend on the scope of the permit.

The WITNESS. I think our application was only for automobiles, as I understand it.

Mr. EISEN. I think the question presupposes that the Commission will grant rights for that.

Mr. STRICKROOT. I understand a common carrier handles everything.

Exam. GRAY. Yes; that is a proper question.

The WITNESS. On the present published tariff rates?

By Mr. STRICKROOT:

Q. If the Cadillac Cartage Company Marine Forwarding Division offered you a hundred tons or more of merchandise and a couple of hundred tons of steel a day from Cleveland to Detroit, or a hundred tons of rubber a day from Buffalo to Detroit,
53 and you received a common carrier permit, would you be in a position to handle it?

A. If the rates were satisfactory; yes, sir.

Q. You have no rates published at present on them?

A. Just the port-to-port rates.

Q. On merchandise?

A. On automobiles.

Q. Just automobiles?

A. Yes.

Mr. STRICKROOT. That's all.

Exam. GRAY. That is all, Mr. McCarthy. We will have a recess for 10 minutes.

(A short recess was taken.)

Exam. GRAY. All right.

Mr. FOSTER. Mr. Eisen will be back in a few minutes.

I have about two or three questions, Mr. Examiner, I would like to ask Mr. McCarthy.

Exam. GRAY. Very well.

Redirect examination by Mr. FOSTER:

Q. Mr. McCarthy, what was the approximate cost of converting the "Tremaine" and "Ingalls" into automobile boats?

A. Cost to—$400,000 apiece.

Q. And would you explain briefly just what was done in order to convert them into automobile boats?

A. It was necessary to remove the cargo bulkheads and
54 strengthen where the bulkheads came out, put in deck beams, center stanchions for two additional decks, which gave us three decks under cover and the top deck; planked it over, putting the floors on the deck on the top of the boats, putting two elevators in the boat that takes them from the top down to the lower hold for loading and unloading the vessel, and equipping the vessel with tie-down cables in the method of tieing down as required by the insurance during the early spring and the late fall season to protect the cars on deck from going overboard, and cementing and straightening up the water bottom—or the tank top, as they call it, which had usually been more or less battered up.

Q. And what means do you use for lowering the cars into the lower deck?

A. The two elevators which are installed.

Q. Do you have any idea what it would cost to convert these vessels back into conventional bulk carriers?

A. I haven't had an estimate on it but it would be quite expensive to put them back into bulk carriers again, the same as they were when we took them over; that is, putting in bulkheads and so forth.

Q. Where does the T. J. McCarthy Steamship Company maintain its offices?

A. In one of the D. & C. office buildings on the rear of 419 West Woodridge Street.

55 Q. On the Detroit dock?

A. On the D. & C. Detroit dock.

Q. And does it rent this space from the Detroit & Cleveland Navigation Company?

A. It does.

Q. What sign do you have out over the office of the T. J. McCarthy Steamship Company?

A. Just T. J. McCarthy Steamship Company, D. & C. Navigation Company, T. J. McCarthy, William J. Hoffman.

Q. That sign was put up when?

A. 1936 or 1937.

Q. And that was put up with the consent of the Detroit & Cleveland Navigation Company?

A. With the consent of the Detroit & Cleveland Navigation Company.

Mr. FOSTER. I think that's all.

Exam. GRAY. Mr. McCarthy, do you or the McCarthy Steamship Company solicit entirely automobiles for the D. & C. Company?

The WITNESS. Automobiles only, D. & C. Navigation Company.

Exam. GRAY. Are you the only solicitor of automobiles for the company?

The WITNESS. My organization. We have about eight men in the organization. None of the D. & C. solicitors solicit automobiles because I have the exclusive contract for the T. J. McCarthy Steamship Company for the solicitation of new auto-
56 mobiles.

Exam. GRAY. And does the other applicant company, the Automotive Trades, have the same kind of agreement?

The WITNESS. No; it is just the T. J. McCarthy Steamship, but we use the same boats, it is the same stockholders and so forth.

Exam. GRAY. All right.

By Mr. FOSTER:

Q. Just one other question. What do you figure the additional life of these boats to be?

A. How much longer?

Q. Yes.

A. Well, they are more than 40 years old now, I think they are in pretty good shape as long as you keep them up. Oh, it is indefinite, 10, 15, 25 years. As long as the vessel is maintained. In fresh water you have a condition that doesn't pertain in the salt water. The usual life in salt water is around 20 years and there are vessels of iron or steel on the Great Lakes that are 60 years old. And that is about when they started to make iron vessels, so we don't know how much longer they will live.

Re-cross-examination by Mr. EISEN:

Q. Do you consider yourself, Mr. McCarthy, part and parcel of the D. & C. Navigation Company?

A. In the solicitation of automobiles, I am a hundred per cent soliciting for D. & C. Navigation Company and do not
57 solicit for T. J. McCarthy Steamship Company under my agreement with the D. & C.

Q. Do you advertise yourself as part of the D. & C. Navigation Company?

A. I sign my letters "D. & C. Navigation Company, T. J. McCarthy, Automobile Division."

The advertising that we purchase and buy in our solicitation reads "Automobile Division, D. & C. Navigation Company."

Q. Is this a correct copy of advertising that is gotten out by the D. & C. Navigation Company with respect to its automobile division [indicating]?

A. No, I think I got this up myself.

Q. You got that up yourself?

A. Yes.

Q. And that is a blotter, is it not, advertising the Detroit & Cleveland Navigation Company?

A. That's right.

Q. And showing in connection therewith that T. J. McCarthy is manager?

A. Yes, sir.

Q. But the only holding out is the holding out of the Detroit & Cleveland Navigation Company?

A. I would say so. That blotter will indicate it.

Mr. EISEN. May that blotter be identified as an exhibit in this proceeding, if the Examiner please?

58 Exam. GRAY. Yes. I will identify that and receive that as Applicant's Exhibit No. 1.

(Exhibit No. 1, Witness McCarthy, received in evidence.)

By Mr. FOSTER:

Q. Is this the same blotter that was being used prior to the time that the contract was made between the T. J. McCarthy Steamship Company and you as an individual? Have you continued to use that same blotter since that time?

A. Yes.

Q. You as an individual now have no relations with the D. & C. and have not since 1937. Is that true?

A. The relationship has been between T. J. McCarthy Steamship and D. & C. Navigation Company.

Q. And this blotter is a carry-over from the earlier blotter?

A. That's right.

Q. And did not take into consideration the change which was made in the contract in 1937 when it was changed from an individual contract to a company contract. Is that right?

A. I think that is right.

By Mr. EISEN:

Q. Isn't it a fact, though, Mr. McCarthy, that you are still distributing these blotters in that form?

A. No, we are not distributing that kind any more, for no good reason except we have got a new one.

Q. In what way is the new one different from this one?

A. I don't know. I think it is prettier.

59 Q. And does it still show the name of T. J. McCarthy as manager?

A. Yes.

Q. And it still shows Detroit & Cleveland Navigation Company with you?

A. Yes.

Q. Do you have any advertising gotten out by T. J. McCarthy or T. J. McCarthy Steamship Company or Detroit & Cleveland Navigation Company that is any different, from the standpoint we are speaking of now, from this blotter? That is, shows D. & C. as the carrying line and T. J. McCarthy, individual, as manager of the automobile division?

A. Yes. It is strictly D. & C. Navigation Company.

Q. So this would be representative?

A. Yes.

Q. Of all your advertisements?

A. Yes, sir.

Mr. EISEN. That is all.

Mr. FOSTER. That is all.

Mr. EISEN. Mr. Examiner, at this time may we request a lunch recess while Mr. McCarthy is still on the stand?

Exam. GRAY. I have no objection. Very well. We will recess until 1 o'clock.

(Whereupon, at 12 o'clock noon a recess was taken until 1 o'clock p. m.)

60 AFTERNOON SESSION—1 P. M.

Exam. GRAY. We will be in session now. Off the record.

(Discussion off the record.)

Mr. FOSTER. I want to state for the purpose of the record, Mr. Examiner, that these cases, being the first cases that were set involving the Great Lakes, that the matter was discussed with the Director of the Bureau and it being an original application and for permanent authority as a common carrier, it was suggested that at the hearing not only the testimony as to the previous operations which would sustain a grandfather application be offered, but that the testimony also as to public convenience and necessity

for the operation also be gone into, and I want to say at this time that we prepared to offer such proof and we would like at this time to offer that proof with the idea of later, if necessary, filing these amended exhibits, not saying that we are not entitled, and leaving that question to later be decided by the Commission, as to whether we are not entitled at this time to go ahead and make our complete showing for a certificate as common carrier.

Mr. EISEN. Mr. Examiner, in all fairness to the Director of the Bureau, his assistants and the staffs, I should like to state that I also had a conference with the gentleman and any statements he made to Mr. Foster were in the light of all three applica-
61 tions pending, because when I discussed the matter with him there was nothing said about the two cases here, but there was quite a bit said with respect to the two subsequent cases, dockets, and in all fairness to the Bureau, I don't think that Mr. Foster's statement should remain on the record unchallenged, and so far as submitting testimony today is concerned, I think Mr. Foster was put on notice with respect to previous decisions of the Commission, the federal courts and the Supreme Court of the United States, with respect to identical features here involved, and the protestants have a perfect right to rely on those decisions and should not be prejudiced thereby.

I think the facts you have stated, the opportunity you have given the applicants, fully protects them in all respects.

They have pleadings, and Mr. Foster as an attorney at law knows you cannot go beyond the pleadings. If the pleadings are to be modified in a subsequent hearing, then that subsequent hearing is the time for the testimony.

The applicant has an opportunity to proceed with the issues and the protestants have come here today prepared to rebut the testimony and submit their own testimony with respect only to that issue.

Now, if the applicant is to be permitted to go beyond the scope of this petition, then the other parties have not had their proper day in court because they are entirely taken by
62 surprise, all without any due or just cause.

Exam. GRAY. Well, then, do I understand, Mr. Foster, that you prefer not to amend the application and offer evidence at an adjourned hearing on that phase of the case?

Mr. FOSTER. Mr. Examiner, we have gone to considerable expense and are prepared now to offer that and we would like now to offer that proof with the idea of a later amendment. We have these witnesses here, and I cannot see as a practical matter why procedure along that line would in any way prejudice anybody.

Mr. SULLIVAN. Well, Exhibit B is not on file.

Mr. EISEN. It definitely does, your Honor, because we are not prepared. If we knew that public convenience and necessity witnesses would be heard, we would have appropriate witnesses to counteract that testimony.

Now if Mr. Foster proceeds with his grandfather case there will be disposition of the grandfather case. If he desires later to proceed with the public convenience and necessity case, we would come prepared to meet it.

Exam. GRAY. An adjourned hearing could be held.

Mr. FOSTER. Could that be held at Detroit?

Exam. GRAY. It could be held at Detroit, or Washington.

Mr. EISEN. The grandfather application would stand on its own merits and the public convenience and necessity would stand on its own merits.

63 Exam. GRAY. It would be part of this proceeding.

Mr. EISEN. You say you are ruling now that if a subsequent petition is filed it may be consolidated with this case without having an opportunity for a motion and argument, or, that a joint hearing on public convenience and necessity matter will come on as though it were a new application?

Exam. GRAY. It is my understanding we will go forward as far as we can here today on the grandfather application and, at the adjourned hearing, consider the amended part.

Mr. EISEN. As a new application?

Exam. GRAY. As an amendment to the present application.

Mr. EISEN. Well, it seems to me, Mr. Examiner, that your basic theory is correct with the exception that either the applicant has grandfather rights or it is a new operator. They are both inconsistent and it seems each would have to be arrived at independently. The Commission would have to find first of all whether the applicant has grandfather rights.

If it has grandfather rights there is no need to go into the new application.

If it hasn't grandfather rights, then it goes into the new application, but each one has to stand on its own feet, but we are prepared to proceed with the grandfather application today and I think that should be heard with respect to our closing proof with respect to the grandfather application.

64 Exam. GRAY. Well, there is no intention on my part to prevent you from doing that.

Mr. EISEN. I understand that, Mr. Examiner. I understand that fully.

Exam. GRAY. The protestants definitely are opposed to the receipt of any evidence at this time on the public convenience and necessity case.

Mr. FOSTER. Do I understand the Examiner's ruling that it will not be received?

Exam. GRAY. I will so rule, Mr. Foster.

Mr. FOSTER. And will you have the record show the request that Exhibit B be filed with respect to that application?

Exam. GRAY. You are making that request?

Mr. FOSTER. Yes.

Exam. GRAY. Yes.

Mr. SULLIVAN. Mr. Examiner, much of what you said about the conference during the lunch hour did not get on this record. That is, the reporter did not take it.

Exam. GRAY. No; I understand that. I think the record shows sufficiently now.

Mr. EISEN. Off the record.

(Discussion off the record.)

Mr. FOSTER. Will you read my statement?

(Record read.)

Mr. CARPENTER. Mr. Examiner, I would like to have the record show that the docket shows only an application filed on form BWC 2. The application makes application under the grandfather clause.

The notice and order of the Commission assigning this matter for hearing only refer to the application that was so filed.

Now, when they have a new service, new operation, why, they so state in their order assigning the application for hearing.

Furthermore, the parties served here were not the individual carriers, that is, the individual carriers or individual competitors that are operating on the Great Lakes were not served with notice of this hearing, and I believe that is one requirement when a new service application is filed.

Mr. FOSTER. They were served.

Mr. EISEN. The applicant has to notify the public of the institution of a new service if the application is approved and I don't think the Commission intends to waive that requirement in connection with the new application that Mr. Foster will file. Otherwise the hearing will be faulty.

Mr. FOSTER. This matter is entirely new, Mr. Examiner, and we have made our motion and we also would like to reserve the right to request, say within 5 days, the permission to file the exhibit and to request a further hearing; so we would like for
66 this hearing here to stand adjourned, in view of the Examiner's ruling on our offer to tender proof at this time as to the public convenience and necessity.

Mr. EISEN. Mr. Examiner, the hearing may stand adjourned as to the public convenience and necessity, which was never as-

signed for hearing, but I object to any adjournment on the grandfather case.

Exam. GRAY. The Examiner is not going to adjourn the hearing at this moment.

Mr. EISEN. I understand that.

Exam. GRAY. At the conclusion of all testimony in respect to the application as it stands, these hearings will be adjourned.

Mr. EISEN. Am I correct that no testimony will be received at the further hearing with respect to the grandfather case?

Exam. GRAY. That would be my understanding of it.

Now, Mr. Foster, you may if you care to, suggest when you want the hearing, and where.

Mr. FOSTER. We would like it at Detroit about three weeks from now, around the 1st of October.

Exam. GRAY. Well, you may make that request when you file the application, if you decide to file the amended application.

Now, does everyone understand the disposition of that matter?

67 Has the examination of Mr. McCarthy been concluded?

Mr. EISEN. Except for one motion.

I would like to make an alternate motion, that all of the testimony he adduced with respect to public convenience and necessity be physically stricken from the record; or that in the alternative, if it is deemed more convenient to the Commission, that the Commission disregard that testimony in the disposition of the grandfather case.

Exam. GRAY. Well, your motion will be on the record.

Mr. FOSTER. In view of the ruling, Mr. Examiner, the applicant has nothing further to offer in these other cases, and I assume that all of the same parties are interested in the case of the Nicholson Transit Company.

Now, we were going to make a motion and I discussed it with Mr. Eisen and Mr. Hewitt, on the testimony of Mr. Brennan of the Chrysler Corporation and Mr. Allen of the Hudson Motor Car Company on the question of convenience and necessity as offered in the McCarthy and Nicholson, that it be applicable in the Nicholson Transit case as it affects the Great Lakes.

Now, they are anxious to go back to Detroit tonight and I understand all the parties are interested also in the Nicholson Transit application.

Mr. EISEN. No; I think you are wrong.

Mr. FOSTER. At least everyone who might appear in this case is interested in it.

68 Mr. EISEN. I think you are wrong.

Mr. FOSTER. Those who are not interested, it shouldn't make any difference to them in any event, and I should at this

time like the opportunity of offering Mr. Brennan's and Mr. Allen's testimony on the transit case.

Exam. GRAY. Well, we haven't got into that case.

Mr. FOSTER. No; we haven't, but I don't see any reason why we couldn't go ahead with that and save Mr. Brennan and Mr. Allen having to wait over here, because they are both busy men and anxious to get back to Detroit; and if the interested parties object to that procedure, object to them testifying out of order, I don't presume the Examiner can permit it, but if there is no objection we could go ahead with it at this time.

Now, the Nicholson Transit Company filed in connection with their automobile operation to Duluth.

Certainly in that case it is clear that the question of public convenience and necessity is an essential issue.

Now, if the various other interested parties do not wish to agree that we can go ahead on this basis, I can see how the Examiner could not force them to do it.

Mr. ELDRED. Mr. Examiner, I don't like to keep anyone here longer than necessary, but I am afraid it is going to prejudice us too much, not knowing what issue is going to be involved in
69 the other case. I think we ought to clean this case up first.

I have had this experience so many times where we have gotten witnesses out of order and we have gotten into difficulties.

Exam. GRAY. Well, Mr. Eldred, I am not prepared to suspend this case at this time and open other proceedings. That matter may be handled by stipulation, Mr. Foster, at the adjourned hearing. That is a suggestion. You might be able to stipulate with the other counsel.

Mr. FOSTER. Well, I will ask the gentlemen who are representing here now if they have any objection to stipulating that at the adjourned hearing in the Automotive and McCarthy case, that we can go into the public convenience and necessity of the Nicholson Transit case.

Mr. EISEN. Mr. Examiner, that puts me definitely on the spot.

Exam. GRAY. I didn't mean that they should stipulate now, Mr. Foster, because obviously they haven't heard the testimony.

Mr. FOSTER. I mean stipulate that it can be taken at that time. How they can be prejudiced by agreeing it can be taken at that time if we are not able to complete this case and put it on this afternoon, I don't see. I don't see how they could be prejudiced by doing that.

Mr. EISEN. Off the record, Mr. Foster.

(Discussion off the record.)

Exam. GRAY. Very well. We will proceed with the dis-
70 position.

Mr. Foster, have you any further evidence on behalf of the applicants?

Mr. FOSTER. No; Mr. Examiner.

Exam. GRAY. Mr. Eisen?

Mr. EISEN. Yes. I call MR. Arnold.

J. M. ARNOLD, being first duly sworn, testified as follows:

Direct examination by Mr. EISEN:

Q. Please state you name and address.

A. My name is J. M. Arnold, the address is Detroit, Michigan.

Q. What are your present business affiliations?

A. I am general freight agent of the Detroit & Cleveland Navigation Company.

Q. Do you have charge over the files of the Detroit & Cleveland Navigation Company with respect to its applications for rights, its billing documents, and matters of that sort?

A. I do.

Q. Has the Detroit & Cleveland Navigation Company filed an application with this Commission in accordance with the requirements of the Transportation Act of 1940?

A. They have.

Q. Seeking grandfather rights in the transportation of automobiles?

A. They have.

71 Q. Upon what specific operations as set forth in your application are those rights predicated?

A. Predicated on the assumption that the Automotive Trades and also the T. J. McCarthy Steamship Company would be part and parcel of it.

Q. In other words, your application specifically and definitely sets forth that your grandfather rights are predicated on the operations of the Detroit & Cleveland Navigation Company, the T. J. McCarthy Steamship Company, and the Automotive Service Activities?

A. That is correct.

Q. Is your grandfather application supported by documentary evidence in accordance with the requirements of the Act?

A. It is.

Q. Among the documents set forth or contained in that application you have specimen transportation documents indicating the transportation of automobiles under Detroit & Cleveland Navigation Company billings which are actually carried on vessels operated by the Detroit & Cleveland Navigation Company bearing the names of the Meade and Tremaine and Ingalls?

A. I have.

Q. Is there any way of identifying in the record just approximately where those documents are contained in the application so that reference thereto can be made in the Commission's files?

72 A. They can be readily found in there. They are about middle way down under bill BC 1187 dated July 28, 1939, trip No. 47. The Steamer "Mead" covers cars, Chevrolet cars, and it is the Detroit & Cleveland Navigation Company as shown in there, and no one else; destination is beyond Buffalo.

Q. Can you give us one or two more bills?

A. Yes; I can give you BC 3446 on November 19, 1939, on the Steamer "Tremaine" on trip No. 60. That also shows no one other than the Detroit & Cleveland Navigation Company.

Q. Do those transportation documents contained in there in support of the application shows additional shipments which moved on the vessels named here today?

A. Oh, yes; there are more here. These are just samples that symbolize what is in the application.

Q. Is there attached to that application a facsimile of the charter arrangement between the Detroit & Cleveland Navigation Company and the T. J. McCarthy Steamship Company for the Steamer "George W. Mead?"

A. There is.

Q. Have you made photostatic copies thereof?

A. I have.

Q. And does that photostatic copy contain on the top of the page thereto renewals of the charter arrangement bringing them down to the present time?

A. That's right.

73 Mr. EISEN. I am going to ask the protestants to bear with me and not ask for copies of these [producing papers]. I would like to offer as Exhibit No. 2, Mr. Examiner, the document just described by the witness which consists first of all of the top sheet of the letter dated February 5, 1941, from James McMillan, secretary of the Detroit & Cleveland Navigation Company, to T. J. McCarthy Steamship Company; directly underneath, letter of January 19, 1940, addressed by the general manager of the Detroit & Cleveland Navigation Company to T. J. McCarthy Steamship Company; directly underneath, letter of January 27, 1939, addressed by the president of the Detroit & Cleveland Navigation Company to T. J. McCarthy Steamship Company; and directly thereunder letter dated March 20, 1937, signed by William K. Muir, of the Detroit & Cleveland Navigation Company addressed to T. J. McCarthy Steamship Company; and then

directly thereunder the agreement and charter itself which consists of 11 sheets.

(Exhibit No. 2, Witness Arnold, marked for identification.)

Exam. GRAY. The papers just identified will be received——

Mr. FOSTER. Mr. Examiner, I would just like to ask the witness a couple of questions before you make a ruling on that.

Exam. GRAY. Very well.

By Mr. FOSTER:

74 Q. Mr. Arnold, how long have you been connected with the Detroit & Cleveland Navigation Company?

A. Since July 1st this year.

Q. And you have no knowledge of the fact that this charter here has been amended in several instances?

A. The only information I have is the information I got from our people on that.

Q. And you didn't ask them whether or not it had been amended as to the licensed personnel who are on 10 months' salary under the union contract—you aren't provided with the amendments to this charter?

A. Whatever is there is what we have.

Mr. FOSTER. Mr. McCarthy testified it had been amended in several instances.

Mr. EISEN. I object to that. I read the charter and Mr. McCarthy agreed to it.

Mr. FOSTER. Not on that. This charter has been amended. Unless this witness can say here this exhibit here is of his personal knowledge—because I know it is not——

Mr. EISEN. Mr. Examiner, I asked the previous witness if he was in charge of the files and he read from the application. I asked him if he had a copy of the charter or had copies of the charter attached to the application, and he said it was. This is a copy of the charter that was in the Commission's files and that was filed with the Commission.

75 If Mr. Foster has any information or knowledge to the contrary, he can submit it. This is what has been submitted to the Commission under oath by Mr. Arnold's predecessors. Mr. Arnold has succeeded to those duties, and he is the man in complete charge of those files. And he has submitted a facsimile of what is in that company's application.

Mr. FOSTER. If you are offering it for that purpose, if you are offering it with the idea that that is what is in the application, I have no objection to it, but if you are offering it as the present existing agreement between the two companies, unless this witness can testify that it is the agreement, I object to it.

Mr. EISEN. Mr. Examiner, I asked him if he had reproduced an exact copy of what was attached to the application, and this is it, and we offer this as part of the application.

Mr. FOSTER. I have no objection.

Exam. GRAY. Very well. The documents as described are identified as Exhibit No. 2.

By Mr. EISEN:

Q. Now, Mr. Arnold, do you have any knowledge of any changes or amendments in this charter?

A. I do not.

Q. As far as you know, this is the existing charter?

A. As far as I know.

Q. Have you checked the agreement and charter party between the Automotive Trades and the Detroit & Cleveland Navi-
76 gation Company against this agreement or charter party which has been identified as Exhibit No. 2?

A. Yes, sir.

Q. Would you say it is identically the same?

A. Same thing.

Q. Word for word, with the exception of the names of the steamers?

A. That is right.

Q. And therefore it could be used as representative of all of the charter parties covered by this application?

A. As far as I know.

Q. Does the Detroit & Cleveland Navigation Company operate the vessels which are the subject matter of this agreement and charter any differently than it operates the vessels which it owns itself?

A. No, sir.

Q. Does the Detroit & Cleveland Navigation Company maintain unlimited and unrestricted control over vessels which are the subject matter here, all during the period of navigation?

A. That's right.

Q. Does that company permit anyone to dictate to it with respect to the operation of those vessels?

A. No, sir.

Q. Do you know whether or not T. J. McCarthy Steamship Company or the Automotive Trades Steamship Company
77 is any exception to that clause, or the statement you have just made?

A. Not as far as I know.

Q. In other words, they can not dictate to the D. & C. with respect to the operation of those vessels during the period of open navigation?

A. That is my understanding.

Q. Have you made facsimiles of transportation documents that appear in your company's files indicating the manner in which automobiles are carried by the Detroit & Cleveland Navigation Company in the boats of the T. J. McCarthy Steamship Company and the Automotive Trades Steamship Company which it operates, or its own?

A. Well, we have photostatic copies here of bills of lading for the years 1938—just one moment, please—'37, '38, '39, '40, and '41. There are two copies of each year [producing papers].

Q. Two copies of the same loading?

A. Yes, sir. On the back of that shows the steamer on which they moved.

Q. You don't mean two copies of the same lading, you mean one lading for each year?

A. That's right. And on the back you will find the name of the steamer on which they were handled.

Q. Is there anything on those documents to indicate transportation by anyone other than the Detroit & Cleveland
78 Navigation Company?

A. There is not.

Mr. FOSTER. Are you going to offer these exhibits?

Mr. EISEN. Yes.

Mr. FOSTER. Let the exhibits speak for themselves, then.

Mr. EISEN. I am offering that as Exhibit No. 3.

Mr. FOSTER. Have you copies of them?

Mr. EISEN. No; I do not.

Mr. FOSTER. Will you provide copies?

The WITNESS. Certainly.

Mr. EISEN. Mr. McCarthy has copies of all of them but we will go to the bother of making additional photostats if you so desire.

Exam. GRAY. The other side are entitled to that.

Mr. EISEN. I will furnish copies.

Mr. FOSTER. You say Mr. McCarthy has copies of them?

Mr. EISEN. I say I will furnish them.

The WITNESS. I will make a notation.

(Discussion off the record.)

Cross-examination by Mr. FOSTER:

Q. Mr. Arnold, you say that you assumed your duties with the Company on July 1 of this year?

A. That is correct.

Q. Well, what are your duties?
79 A. General freight agent.

Q. What do your duties consist of?

A. I have direct charge of all traffic, freight, making up, telegraphing, everything pertaining to freight traffic, traffic department.

Q. And the dispatching of all boats?

A. I have nothing to do with the dispatching of boats.

Q. You have nothing to do with the dispatching of boats?

A. No, sir.

Q. Have you ever seen the solicitation agreement between Mr. McCarthy and the Detroit & Cleveland Navigation Company?

A. I did, yes.

Q. Did you ever see the original of the charter of which this is a photostat?

A. No; I just saw that.

Q. Just saw the photostat?

A. That's right—of this application here, grandfather application.

Q. You don't know of your knowledge of any subsequent amendments to this charter?

A. All I know is what is in this application.

Q. All you know is the photostat there offered as an exhibit is in the application?

A. That is what I said before.

Q. In this application you also submit the operations of
80 your own ships, do you not?

A. Yes.

Q. And they operate over these same routes?

A. Pretty generally.

Q. The fact has not occurred to you that if you do not recharter Mr. McCarthy's boats your application for grandfather rights would be denied?

Mr. EISEN. I object.

Mr. FOSTER. He said he would rely on that.

Mr. EISEN. I object and the record will bear me out, as the basis for the grandfather application but the reference in the application to operations of T. J. McCarthy, the Automotive Trades and the Detroit & Cleveland Navigation is made?

The WITNESS. That's right.

By Mr. FOSTER:

Q. And in the application it was absolutely necessary for you to do that, was it not, in connection with any chartered boats?

A. That may be a question of law, I don't know.

Q. Well, look at page 4 of the application, paragraph 3, description of equipment.

A. The exhibits, you mean?

Q. No; it is in the main part of your application, on page 4 of your application, description of equipment.

A. Yes.

Q. It was necessary for you to state the boats that you had
81 under charter, was it not?

A. That may be a question of law.

Q. I am asking you if the application did not require you to state it. You have the application before you?

A. We named the boats and named the companies in there.

Q. Yes. And the application provided that you must name them.

Mr. EISEN. I am going to object to whether it requires that you must. There are blanks there.

Mr. SULLIVAN. There are blanks there for the purpose.

The WITNESS. They were filled out in accordance with that.

By Mr. FOSTER:

Q. You have no knowledge now of whether you will charter those boats next year or not?

A. We have a contract for 1942.

Q. You have a contract?

A. For two of those boats, yes. We are to have the option of using those boats next year.

Q. But you have no idea of whether you are going to exercise that option?

A. I am not a medium. I didn't say that.

Q. That would be for the executives to decide?

A. I would probably be consulted on that too.

Q. You would probably be consulted on it?

A. For my recommendations.

82 Q. While in the event you didn't charter these boats, what would be the basis of your protest of Mr. McCarthy operating them over the same routes?

Mr. EISEN. Mr. Examiner, I am going to object to anything outside the scope of the direct examination. I have no objection to Mr. Foster recalling my witness if he so desires as his own, but this is cross-examination and I am going to object to any questions which go beyond the scope of the direct testimony.

Exam. GRAY. I will have to sustain that.

Mr. FOSTER. He has stated he was using the charter of these boats as the basis of his application.

Mr. EISEN. He didn't state that.

Mr. FOSTER. Will you go back, Mr. Reporter, and read that?

Mr. EISEN. The first question I asked Mr. Arnold, I think, is the one Mr. Foster wants you to read, or one of the first.

The Reporter [reading]:

"Q. Has the Detroit & Cleveland Navigation Company filed an application with this Commission in accordance with the requirements of the Transportation Act of 1940?

"A. They have.

"Q. Seeking grandfather rights in the transportation of automobiles?

"A. They have.

83 "Q. Upon what specific operations as set forth in your application are those rights predicated?

"A. Predicated on the assumption that the Automotive Trades and also the T. J. McCarthy Steamship Company would be part and parcel of it.

"Q. In other words, your application specifically and definitely, sets forth that your grandfather rights are predicated on the operations of the Detroit & Cleveland Navigation Company and the Automotive Service Activities?.

"A. That is correct."

Mr. EISEN. My objection is that it is beyond the scope of the direct examination.

Mr. FOSTER. Mr. Examiner, he said his right was predicated upon him operating not only his own ships but those of the T. J. McCarthy and Automotive Trades.

Now, that is what the witness testified to, regardless of what Mr. Eisen says. He has opened that question. He has offered these bills of lading and he reads from his application. He has opened up that question.

Mr. EISEN. The question was: "What does your application show?" and it shows his company is seeking grandfather rights on the operations of three separate entities' vessels.

Mr. FOSTER. I think he has opened up the question of what he is going to do if he doesn't have these boats.

84 Exam. GRAY. I think that is entirely speculative, Mr. Foster. We are not concerned here with what the applicant is or is not going to do in 1942 as much as what he has been doing in the past.

Mr. EISEN. And the main issue Mr. Foster is discussing is whether the Commission is going to grant two grandfather rights.

Mr. FOSTER. Mr. Examiner, I want to ask Mr. Arnold this question: You have set forth in your application the operation of your own ships over precisely these same routes and in handling these same commodities. Is that not right?

Mr. EISEN. Refer to the application and check it.

The WITNESS. Whatever the application calls for.

By Mr. FOSTER:

Q. You have the application before you?

A. Yes, but it would require considerable reading to read it all.

Q. You have it there before you and have been referring to it before, and I ask you to look at the application and answer the question as to whether or not this application does not also contain in it facts as to the operation of your own ships between Detroit and Cleveland and Detroit and Buffalo.

A. It will have to.

Mr. EISEN. Separate and distinct.

By Mr. FOSTER:

Q. Separate and distinct from the other boats.

85 A. That's right.

Q. And it is on the basis of that—

Mr. EISEN. Wait a minute. Let him find it first.

The WITNESS (examining papers). Yes. It is referred to down here [indicating]. It is shown by various exhibits attached to the application.

By Mr. FOSTER:

Q. What is the exhibit number?

A. Exhibit A-11-A.

Q. What is that?

A. Description of regular routes showing regular routes, Detroit, Cleveland, Cleveland to Detroit, Detroit to Buffalo, Buffalo to Detroit.

By Mr. EISEN:

Q. Mr. Arnold, do you understand the question, what in the application sets forth matters that pertain wholly and exclusively to the matters handled by your own boats as distinguished from the boats of the other two companies?

A. It is all more or less tied together.

Q. You can not find anything in there that sets forth information applying wholly to your own company's boats?

A. They are tied up together.

Exam. GRAY. At this moment I think these bills of lading have not been received in the record. You have offered them as an exhibit?

Mr. EISEN. I really ought to apologize. Mr. Arnold did

86 describe them in detail but we went off on a tangent. Perhaps after Mr. Foster completes his testimony—I don't want to interrupt him.

By Mr. Foster:

Q. Mr. Arnold, turn to page 4 of your application, paragraph 3, description of equipment, subparagraph A.

A. Subparagraph A?

Q. Yes. A, number of vessels.

A. I am just trying to get the same page you have got there.

Q. It is page 4.

A. I have got page 4. Are you counting this as one page and this as one page [indicating]?

Q. No, page No. 4.

Mr. Eisen. On the top, under your clip.

Mr. Sullivan. That will be the back of the second sheet.

The Witness. Page 4. I have got it here, yes.

By Mr. Foster:

Q. Description of equipment?

A. Yes.

Q. Will you read the description of equipment?

A. Owned, chartered, leased from others; 10. Is that what you mean, predecessors?

Q. Read the whole thing starting with A.

Mr. Eisen. Mr. Examiner, must we have the printed form read into the record?

Mr. Foster. I want to show he is relying on his own vessels, not just these vessels.

87 Mr. Eisen. We concede the application asks the number of vessels but that wasn't the question. The question was: "What in there shows the activities to Detroit and Cleveland separately from the activities of the other two lines."

Now, the number of vessels does not show that.

Mr. Foster. I am going to break it down and show which were his and which were chartered.

Mr. Eldred. What is the purpose of that for this proceeding?

Mr. Foster. The purpose is to show it was not necessary for the D. & C. to rely on that to have grandfather rights. It isn't a question of beating D. & C. out of anything at all. They have both been operating there for years over these same routes.

Mr. Eldred. I don't see that that has any bearing.

Mr. Foster. I want to develop that they operated their own vessels over precisely the same routes as these chartered ships.

Mr. Eisen. Well, I move that you have incorporated by reference in this record the application of the Detroit & Cleveland Navigation Company for grandfather rights.

Mr. Foster. We have to have copies of it, then.

Mr. Eisen. I said incorporated by reference.

Mr. FOSTER. Well, we have to have copies.

Mr. EISEN. No.

88 Mr. FOSTER. Mr. Examiner, I would like to know whether I am going to be permitted to go into the question as contained in their application and show the boats they operated and show among those the boats which were owned by them and which were chartered.

Now they have brought up that question and Mr. Eisen has attempted to interpret that the D. & C.'s whole right to grandfather rights will rest on those ships.

Exam. GRAY. That is perhaps an erroneous conclusion; that is one of the factors the D. & C. is relying on, not the sole factor.

Now, I don't want too much of that extraneous application being brought in here.

Mr. EISEN. Mr. Examiner, in defense of myself I think I refuted that assertion three or four times by having my question read. I do not place any such implication and I think it is entirely unfair for Mr. Foster to ask that question again and again. I asked Mr. Arnold if the claim of the Detroit & Cleveland Navigation Company was predicated on the activities of all three companies. Now, I haven't drawn any conclusion.

Mr. FOSTER. The witness having answered it, I submit it is only proper that we be permitted to go into that question as to how they were operated and where they were operated, without this continual objection from Mr. Eisen.

89 All I want to do is to clarify that the 10 ships, on the operation of which they are basing their rights, were operated, so it may not later be argued in a brief that by the operation of these ships they could not have any grandfather rights. That is the point I want to develop.

Mr. EISEN. May I inquire whether we are now trying the D. & C. application?

Mr. FOSTER. No; we are not.

Mr. EISEN. Then why go into it?

Mr. FOSTER. Because you are claiming the D. & C. have no rights because we are operating these ships.

Mr. EISEN. No. I said the question was whether two lines can have grandfather rights for the same operation. It is all up to the Commission. The D. & C. has rights, the T. J. McCarthy has them, and whether the McCarthy has them to the exclusion of the D. & C. is all that I said.

Exam. GRAY. Well, Mr. Foster, we had better not go into the application of the D. & C.

Mr. FOSTER. Mr. Examiner, this is the request of the D. & C. for operation. They come in and say, "No, we are relying on those ships for our grandfather rights."

Certainly to preclude us going into the basis of that operation, if we are doing that there is no use of going any further on this, if that is the ruling.

Exam. GRAY. No. Mr. McCarthy has testified that all
90 his vessels were chartered to the D. & C. Navigation Company.

Mr. FOSTER. That's right.

Exam. GRAY. Well, now, that is established in the record and there is no dispute about that. There is no dispute that the D. & C. Navigation Company is operating and that it has filed its application. I think it is unnecessarily prolonging the matter, going into it.

Mr. FOSTER. I should have been through half an hour ago with it. There are only about three questions I want to ask.

Mr. EISEN. Make them relevant, and I won't object.

Mr. FOSTER. I take it the Examiner is ruling that I can not ask the general traffic manager of the protestant the basis under which it operated the chartered boats of the T. J. McCarthy and the Automotive Steamship.

Mr. EISEN. I will interpose to the Examiner that the firm ruling of law is that the written document speaks for itself. We have put it in, whereas, it was the applicant's duty to put it in, but we have been endeavoring to give the Commission everything in our power to give a clear cut picture.

The written document is in the record and it speaks for itself.

Exam. GRAY. That is as I understand it the basis on which the vessels are operating.

Mr. FOSTER. The witness has admitted he has not put in
91 the whole charter.

Mr. EISEN. Mr. Examiner, I think Mr. Foster ought at least to keep his remarks confined to facts.

Mr. FOSTER. He said he knows nothing about any amendments to the charter.

Mr. EISEN. As far as he knows that is the charter. That is all he said.

Mr FOSTER. Mr. Eisen, you brought it out yourself that this is the charter attached to the exhibit and the witness testifies he has no knowledge of the charter.

Mr. SULLIVAN. That is not admitting.

Mr. EISEN. I asked him if he knew of any amendments and I asked him whether it was the present charter. He said, "As far as I know, it is."

Why do you state he said it is not the present charter?

Mr. FOSTER. I didn't say that.

Mr. EISEN. Well, have the reporter go back.

Mr. FOSTER. You say you are offering it for that purpose. If you are offering it for any other purpose, we object to it.

Mr. EISEN. I am offering it for the purpose therein. The Commission can put it to any purpose it desires. It was the province of the applicant in the first instance to put it in.

Mr. FOSTER. It was not.

92 Mr. EISEN. I think it was, and I am doing it for the benefit of the Commission. If you have any knowledge of anything contradicting it, you are at perfect liberty to put it in and nobody is precluding you from doing it.

Mr. FOSTER. Will you go back, Mr. Reporter, and read the question that I asked the Examiner?

Mr. EISEN. I would like the record to show that Mr. Eisen is not the only one that asks the reporter to go back and read the record.

Mr. FOSTER. I think the record will show that, Mr. Eisen.

If the Examiner please, Mr. Eisen opened up this question by having Mr. Arnold read right from the application itself the information about these chartered boats and about the operation of these chartered boats. Now he has opened up that on direct examination of his own witness on reading more from the application.

Now all I want to do is to pursue that question and show on what basis those boats were operated and to show also that they were operating their own boats and over the same routes, and that their application will in no way rise or fall upon the operation of these chartered boats.

That is what I want to develop from this witness' testimony in view of the fact that the record as it now stands can very well leave the inference that the Commission might find itself in

93 the position of granting two companies grandfather rights on the operation of the same ship.

That is the point I want to clarify.

Exam. GRAY. Well, wouldn't that be in connection with the D. & C. application?

Mr. FOSTER. No, because he is using as a basis for that application the fact that he chartered and used these boats and has endeavored to leave the impression, whether intentionally or otherwise, that when the application does come up he might find himself in the position of someone else having been granted the permit and finding himself out on a long limb.

That is the point I want to correct. That was opened up by Mr. Eisen on direct. All I am asking of the Examiner is to clarify the situation. I don't want to be left in the position that the Examiner rules Mr. Eisen can use only so much of that as he

sees fit and have you say that is all, you can not pursue that question any further.

Exam. GRAY. Well, at this time we will take a short recess.

(A short recess was taken.)

Exam. GRAY. Now, Mr. Foster, it is the Examiner's understanding that the McCarthy vessels are being operated by the D. & C. Navigation Company, and the charter has been introduced in the record. I think that shows the manner in which the applicant's vessels are being operated.

94 Mr. FOSTER. Mr. Examiner, you missed my point.

Exam. GRAY. Very likely.

Mr. FOSTER. I want to show that the application which they have referred to here and which they have read from and which they have used up to the point where they desire to use it, sets forth that operation. And I also want to show that it also shows these other exhibits, that they would have these grandfather rights, and are in no wise dependent under that application on the operation of these McCarthy boats.

Mr. ELDRED. Mr. Examiner, I don't see how we can determine whether the D. & C. are entitled to grandfather rights in this proceeding. That is not in issue here. It is only the application of these two applicants in issue here and it has nothing to do with the D. & C. rights.

Now, whether they are going to rise and fall on these two boats is going to be determined in separate proceedings.

Mr. EISEN. He says the witness answered in reading from the application. I don't recall the witness reading from the application in answer to any of my questions.

Exam. GRAY. We are not getting very far.

I will sustain your objection, Mr. Eisen.

Mr. FOSTER. As I understand it, I can not pursue the questioning of this witness any further in connection with their operation of the chartered boats and their own boats. Am I precluded

95 from going into that part of the question which has been opened up by Mr. Eisen on direct examination of this witness?

If that is the ruling, I am perfectly satisfied, but I do want the record to show that that is the ruling.

Mr. EISEN. Six or seven times I have heard Mr. Foster say I have opened something up.

I have reiterated and reiterated my question to the witness. I asked if the application showed on what it was predicated. He didn't read anything from the application. I don't know what Mr. Foster is talking about. My objection was the cross should be confined to the scope of the direct. I didn't object to any cross

examination on the scope of the direct. My objection went to the cross examination beyond the scope of the direct.

Exam. GRAY. That is what I am sustaining, the objection to the cross examination beyond the scope of the direct examination.

Mr. FOSTER. Then does the Examiner rule that, it having been opened up by the witness on direct examination, the question as to the chartering and the operation of these three chartered boats and the fact that the application of the Detroit & Cleveland Navigation Company was predicated on the operation of these ships, that we are not permitted to go ahead and show that they were
96 operating these ships, along with their own ships, and over the same routes, and the basis on which they were operating those ships?

I mean if that is the ruling of the Examiner as to the scope of the direct and the scope of how far we can go, I am quite content with it, with an exception. But I do want the record perfectly clear on it.

Mr. ELDRED. Mr. Examiner, I don't think you have made any such ruling at all.

Mr. EISEN. I am not going to answer that, Mr. Examiner.

Mr. FOSTER. I didn't ask you for an answer.

Mr. EISEN. I am addressing my remarks to the Examiner. The record speaks for itself.

You have already made the ruling. Anyone can read the record and see the effect of your ruling. I don't see why you should be pinned down to it.

Mr. ELDRED. If there is any further question to ask, let him ask it.

Mr. FOSTER. We will go back to the charter, which I thought was clarified once before.

By Mr. FOSTER:

Q. You don't know of your own knowledge, Mr. Arnold, whether the exhibit that has been offered is the present existing charter between Detroit & Cleveland Navigation Company and the T. J. McCarthy Steamship Company?

A. I told you before it was not——

Q. Will you answer the question?

A. I said what was in this application for grandfather
97 rights, that is that same charter. This is the third time I have said it.

Mr. FOSTER. Will you read the question?

(Question read.)

Mr. FOSTER. That question can be answered yes or no, Mr. Examiner.

Exam. GRAY. Yes, the answer was not responsive.

Mr. FOSTER. I ask that the question be answered yes or no.

The WITNESS. Will you read the question again?

(Question re-read.)

A. To the best of my knowledge and belief; it is.

Mr. FOSTER. I ask that the answer be stricken as not being responsive.

Mr. EISEN. That is silly. The answer is responsive.

Exam. GRAY. He said he believes it is.

Mr. FOSTER. No, he didn't say it; he said to the best of his knowledge.

Exam. GRAY. As far as he knows it is. That is what you meant, Mr. Arnold?

The WITNESS. Yes, sir; it is; to the best of my knowledge, it is.

Exam. GRAY. I will accept that as a proper answer.

By Mr. FOSTER:

Q. In addition to the vessels that were under charter from the Automotive Trades and the T. J. McCarthy
98 Steamship Company, did the Detroit & Cleveland Navigation Company operate its own vessels over these same routes and between these same ports during 1939 and 1940?

A. They probably did.

Q. Do you know whether or not they did?

A. To the best of my knowledge and belief they did.

Q. How many vessels did they operate?

A. I couldn't tell you that today.

Q. Does the application show that?

A. Whatever is in the application would show it, yes. It shows right here in the application what we operate.

Q. Will you turn to page 4 and tell us how many vessels it did so operate?

A. Do you want me to read from description of equipment?

Q. That's right.

Mr. SULLIVAN. Now that question was "so operate." That word "so" ties it up with ownership. Take 3 chartered ships from 10, and you have 7 left. Explain those. Let us get somewhere.

Mr. FOSTER. Thank you.

By Mr. FOSTER:

Q. How many did you operate?

A. This says "total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on January 1, 1940, including vessels owned, chartered, or leased from others, 10."

99 "Number of owned vessels operated by applicant (or predecessor in interest), 6."

Now, for No. 2:

"Number of vessels under charter to applicant (or predecessor in interest), 4."

"Paragraph B, number of vessels owned by applicant (or predecessor in interest) and under charter to others on January 1, 1940, none."

Do you want me to read any further?

Mr. CARPENTER. Read the whole application.

By Mr. FOSTER:

Q. That's all right. Who are those four vessels chartered from?

Mr. ELDRED. Oh, I object to that, Mr. Examiner. That has no bearing whatsoever, whether they are all chartered or who they were chartered from, in these proceedings. We know there are three chartered from this applicant. What this company is doing with other vessels has no bearing here at all.

Exam. GRAY. That is beyond the scope of the applicant's operations, Mr. Foster.

Mr. FOSTER. I want to show it is owned by a fully owned subsidiary and is operated on the same routes.

Exam. GRAY. That is very pertinent as to the D. & C. Navigation Company but their application is not under consideration now.

Mr. FOSTER. But they are protesting ours and are making the claim that their rights under the 1940 Transportation Act are predicated upon the operation of our ships as part of their whole unit and I think I have a right to show that vessels owned by that company and its wholly owned subsidiaries, acting over precisely the same routes—that the Commission is not going to be in the position of granting two companies certificates on the operation of the same ships.

100

Now, that is the purpose of this line of testimony.

Exam. GRAY. Very well. The witness may answer.

The WITNESS. What is the question?

Mr. SULLIVAN. The last question was "from whom do you charter that fourth ship?"

Mr. FOSTER. That's right.

The WITNESS. Is that what you want to know?

Mr. FOSTER. That's right. That is the last question.

The WITNESS. Mr. Examiner, can I ask a question?

Exam. GRAY. Yes.

The WITNESS. Whose application are we trying here now, the D. & C. or the T. J. McCarthy and the others?

Mr. EISEN. Mr. Arnold, if you know the answer, answer it. If you don't know, say you don't.

The WITNESS. I don't know.

By Mr. FOSTER:

Q. Do you know who owns the Steamer "Fitch?"

A. I do not.

Q. You know that you operate her?

101 A. I have heard of it.

Q. You have been traffic manager since the first of July?

A. That is right.

Q. Now, I ask you a question as to whether or not you know whether you operate that ship. Do you or do you not?

A. I understand to my best knowledge and belief that we do.

Q. Have you seen it at your docks?

A. I have seen it at our docks.

Q. Loading automobiles?

A. I wouldn't say definitely I have seen automobiles being loaded on it.

Q. Have you seen it on your docks?

A. I have seen it on our docks.

Q. And as traffic manager of your company you don't know whether you operate the "Fitch" or not?

A. I understand that we do.

Q. And do you know whether it was so operated in 1939?

A. I do not.

Q. This exhibit that you read from earlier attached to the application, does that throw any light on it?

A. As to the "Fitch?"

Q. Yes. The exhibit that you got the information from about the "Tremaine" and "Ingalls" and "Mead."

A. I don't see it here.

Q. That is the application there (indicating). The

102 exhibits are in the back.

A. Yes, I looked there. Now, what is your question?

Q. Have you any exhibit attached to your application then that shows ownership of the "Fitch"?

A. I find here that the Detroit & Cleveland Steamship own the—or apparently charter the vessel "William F. Fitch," charter it for the season 1941.

Q. That is, you chartered it from the Detroit & Cleveland Steamship Company?

A. I assume we did.

Q. And you know nothing about the ownership of the Detroit & Cleveland Steamship Company?

A. I am in no position to say.

Mr. FOSTER. I think that's all.

Exam. GRAY. Any further cross examination of Mr. Arnold?

Mr. ELDRED. Just one question.

Mr. EISEN. Is that redirect?

Mr. ELDRED. It will be cross examination.

Mr. EISEN. May I break in now to have Mr. Arnold describe Exhibit No. 3?

Exam. GRAY. Yes, please do.

Redirect examination by Mr. EISEN:

Q. Will you please read the dates and any identification marks and then read the vessel under which any automobile transportation covered by the document moved, Mr. Arnold?

103 Mr. SULLIVAN. Why do the documents have to be read into the record?

Mr. EISEN. We offered them as exhibits.

Mr. SULLIVAN. Why does it have to be read off?

Mr. EISEN. Just the docket numbers for identification. The Examiner asked to have that identified.

The WITNESS. The Examiner wishes it to be done. The first shipment moved out of Pontiac, Michigan, shipped by Pontiac Motor Division.

Mr. SULLIVAN. Can't that all be done by documents?

Mr. EISEN. Just read the pro and the date.

The WITNESS. I was just going to show the shipper and show that was July 7, 1937, shipment of automobiles loaded on steamship "Tremaine," trip No 40, 1937.

Exam. GRAY. I would identify these separately. That will be Exhibit 3.

(Exhibit No. 3, Witness Arnold, marked for identification.)

The WITNESS. Shipment of automobiles from the Oldsmobile Division, General Motors Sales Corporation, Lansing, Michigan, July 3, 1937, on pro-B-1900 routed by D. & C. Navigation Company.

I would like to say that the other one is also loaded the same way.

104 Exam. GRAY. That is Exhibit 4?

(Exhibit No. 4, Witness Arnold, marked for identification.)

The WITNESS. Shipment from Flint, Michigan, on November 29, 1938, consigned to Buick Motor Division Sales Corporation, Hornell, New York, routed by D. & C. Navigation Company.

Exam. GRAY. Exhibit 5.

(Exhibit No. 5, Witness Arnold, marked for identification.)

Mr. ELDRED. Just a minute Mr. Examiner. Do I understand that all these bills indicate movements insofar as the Detroit & Cleveland Navigation Company is concerned between Detroit and Buffalo——

The WITNESS. Detroit and Buffalo.

Mr. ELDRED. Detroit and Buffalo.

Mr. EISEN. Any Cleveland in there?

Mr. ELDRED. If there are I think the record ought to show exactly the movement insofar as the D. & C. are concerned at points of destination and origin.

The WITNESS. Well, I might say, going back to the first one, it was dispatched to Mohawk Valley, Utica, routed via D. & C. through Buffalo, Steamer "Tremaine," trip No. 40, 1937.

The second one was consigned to Specter Genesee Motor Sales Company, Syracuse, New York, routed via D. & C. through Buffalo on the Steamer "Tremaine" Trip No. 39, 1937.

105 The third one was consigned by Buick Motor Division, G. M. Sales Corporation to Hornell, New York, routed by D. & C. through Buffalo, Steamer "Tremaine," Trip No. 17, 1938.

The next one was from Detroit, Michigan, in September, 1940, No. B-19151 consigned to Ludlow Motor Company, Buffalo, New York, routed via D. & C. on the Steamer "Tremaine," Trip 53, 1940.

Exam. GRAY. That one is Exhibit 6.

(Exhibit No. 6, Witness Arnold, marked for identification.)

The WITNESS. The next one was from Detroit, Michigan, on September 6, 1940, routed via Detroit & Cleveland Navigation Company, consigned to George C. Reinoehl, Buffalo, routed via D. & C. on pro-B-19138 on the Steamer "Tremaine," Trip No. 53, 1940.

Exam. GRAY. Exhibit 7.

(Exhibit No. 7, Witness Arnold, marked for identification.)

The WITNESS. That was September 6, 1940, for the Chrysler Corporation.

From the Chrysler Corporation, June 18, 1941, via the D. & C. Navigation Company, to Rudolph Motors Company, Inc., Buffalo, New York, on pro-B-19634, on the Steamship "Mead," Trip 40, 1941.

Exam. GRAY. That one is Exhibit 8.

106 (Exhibit No. 8, Witness Arnold, marked for identification.)

The WITNESS. From the Chrysler Corporation, Detroit, Michigan, June 18, 1941, via Detroit & Cleveland Navigation Company consigned to Burtiss Motor Sales, Inc., Buffalo, on the Steamship "Tremaine," Trip 34, 1941, on pro-B-19686.

Exam. GRAY. Exhibit 9.

(Exhibit No. 9, Witness Arnold, marked for identification.)

The WITNESS. From the Hudson Motor Car Company, Detroit, Michigan, October 23, 1939, to Warren Motors, Buffalo, New York, routed via D. & C. Navigation Company on pro-B-19273 forwarded on the Steamer "Mead," Trip 76, 1939.

Exam. GRAY. Exhibit 10.

(Exhibit No. 10, Witness Arnold, marked for identification.)

Mr. SULLIVAN. This could be introduced in two minutes without taking all this time. We could have a sheaf of 10 exhibits identified and not have to sit here all this time for that stuff.

Re-cross-examination by Mr. ELDRED:

Q. Now, as far as you know, since you have been with the Detroit & Cleveland Navigation Company, has any freight been carried on boats which have been operated by your company under any other bill of lading than that of the Detroit & Cleveland Navigation Company?

107

A. No, sir.

Q. Referring specifically to the three boats under charter from the Automotive Trades Steamship Company, and T. J. McCarthy Steamship Company, has any freight been carried on those boats under any other bill of lading than that of the Detroit & Cleveland Navigation Company?

A. Not to my knowledge.

Q. Now, would you look at the charter, please, sir, copy of it?

A. Which one?

Q. The original charter.

A. That was the "Tremaine."

Q. Yes.

Mr. EISEN. No. That was the "Mead."

The WITNESS. We just took that as a symbol of all of them.

By Mr. ELDRED:

Q. Will you please just point out for the record so we may know the paragraph there, part of the paragraph, which sets forth who shall pay for the expenses in connection with the operation of the boat when it is operated in the revenue service?

A. Paragraph 3.

Q. Does the charter provide that you shall have the exclusive use of the boat during the entire navigation season?

108

A. As I understand it, yes.

Mr. FOSTER. I submit that the charter is the best evidence on that, Mr. Examiner. To ask the witness what some exhibit that is in the record provides——

Mr. ELDRED. Unfortunately, I would like to know something about it. I don't happen to have a copy of it.

Mr. FOSTER. There is a copy right in front of you.

Mr. ELDRED. That is Mr. Eisen's. I would like to ask a couple of questions, if I am out of order, Mr. Examiner.

Exam. GRAY. Proceed.

Mr. ELDRED. Where was I?

(Question and answer read.)

Mr. FOSTER. Mr. Examiner, I object to that question because the charter speaks for itself. To ask the witness what the charter provides asks for a conclusion both as to law and as to fact, Mr. Examiner. The document speaks for itself and I move that that answer be stricken.

Exam. GRAY. Well, the document speaks for itself all right. I will not strike the answer.

Mr. ELDRED. You will not. That is all I have.

By Mr. FOSTER:

Q. What provision of the charter do you base that answer on, Mr. Arnold?

A. The charter itself.

Q. What provision? You have it there as an exhibit, you referred to it.

109 A. The charter speaks for itself, I said.

Mr. SULLIVAN. Now, you speak for the charter.

By Mr. FOSTER:

Q. You speak for the charter.

A. Do you want me to sit here and read this whole charter?

Q. No, you said you understood that, but I want to know why you understand that.

A. Because the charter speaks for itself, you said. I take the same position.

Mr. FOSTER. Mr. Examiner, that is where we get. It is only a conclusion, what the charter provides, and he hasn't the slightest idea what the terms of that charter are.

The WITNESS. Mr. Examiner, this charter here charters that boat to us for our exclusive use during the period of navigation when we have it under charter. I was asked a general question on what this charter provides for. I attempted to answer that question to the best of my ability. I don't know why I should go all over this here and try to point out some specific point in the charter that might change the answer. I will have to read that whole charter to understand what the purpose of this leading question is.

By Mr. FOSTER:

Q. Mr. Arnold, you say you have the whole charter and you say you understand it does give you the exclusive right.

A. That's right.

Q. Now, you have testified from the exhibit, and I am
110 asking you whether that is your general idea, whether you have any knowledge, or on what you base your answer.

A. Based on my understanding of what I understand the charter means. I have chartered vessels for about 10 years; a charter

means you charter the vessel, it is under your jurisdiction. You make that charter for a trip, you make that charter for a month, you make that charter for a year.

Mr. FOSTER. I guess that is all.

Exam. GRAY. If no one wants to examine you further, you are excused.

(Witness excused.)

Mr. EISEN. May I offer those exhibits if they have not been received as yet?

Exam. GRAY. Yes, Mr. Eisen. They have been identified, and are received as 3 to 10, inclusive.

(Exhibits Nos. 3 to 10, inclusive, Witness Arnold, received in evidence.)

Mr. FOSTER. Now, Mr. Examiner, I cannot see where they have any materiality whatever on the T. J. McCarthy Steamship Company's application. I cannot see where these 10 exhibits with the explanation of what they were, and the photostats, have any bearing whatever material to Mr. McCarthy's application. I ask that the exhibits be not received because they have not been identified, they are photostats of something, and as to where
111. the thing came from, as to whether those automobiles moved on those particular boats or anything has not been identified. This witness says that he came the 1st of July. I submit that those exhibits have not been properly identified, and I object to their being received in evidence.

Exam. GRAY. The record will show your objection, Mr. Foster, and I then will overrule it.

Mr. FOSTER. Exception.

Mr. EISEN. I have no further witnesses.

Exam. GRAY. Mr. Sullivan, do you have any presentation in these cases?

Mr. SULLIVAN. No, sir.

Exam. GRAY. Is there anything further to come before the Commission in the application of T. J. McCarthy Company and the Automotive Trades Steamship Company?

Mr. EISEN. Mr. Examiner, if the case is going to be closed here and not briefed, I would like to direct attention to certain decisions appropos of the present proceeding.

Exam. GRAY. There is no inclination to preclude anyone from filing briefs, and briefs will be due within 30 days of the close of the hearing. I presume that will be determined by the adjourned hearing.

Mr. FOSTER. I would like to make the motion that the hearing be adjourned to Detroit with the right on behalf of the com-
112 pany to file the Exhibit B and have testimony in regard to the convenience and necessity feature of it.

Exam. GRAY. Well, the application for that hearing is received and will be entertained.

Mr. EISEN. Do I understand, Mr. Examiner, that this proceeding with respect to the grandfather application is closed? Is that right?

Exam. GRAY. I am not going to close it; no. I will adjourn the hearing until the conclusion.

Mr. EISEN. In the grandfather case?

Exam. GRAY. I will adjourn the hearing today; yes.

Mr. EISEN. Well, before you adjourn then, I would just like to direct the attention of the record to the decision of this Commission in 47 MC–335, Dixie-Ohio Express Company, common carrier application.

Mr. ELDRED. May I inquire of Mr. Foster what application and amendment he proposes to file to the present application?

Mr. FOSTER. The reason we are asking for an adjournment is because we want time to consider that matter, so I cannot answer that question precisely now. We started on the theory that we were going to be permitted to go into that phase of it in this present case.

Mr. ELDRED. Well, I was going to ask you—you will have to wait until the application is filed, I suppose. That is the only thing you can do.

I desire to call attention of the Commission, however, 113 that this relationship between these two companies and the Detroit & Cleveland Navigation Company existed some time prior to the grandfather date and there is nothing in this relationship and it is not an interim relationship. I mean, this is solely a grandfather relationship all the way through. It seems to me that if there is going to be any application filed it would have to be of necessity a new service application. It could not be an amendment to your grandfather application.

Mr. FOSTER. That is on the basis that the Commission ultimately rules that part 3 is going to be treated the same way as the Motor Carrier Act.

Mr. ELDRED. No. The law is very distinct in this respect.

Mr. FOSTER. I mean as to who has— -

Mr. ELDRED. I am not trying to say who has the right. I am only trying to find out that your relationship is a grandfather relationship. It cannot be anything else. It will have to be decided on that. Now, if you are filing an application to show public convenience and necessity, it must be a new application, a new service application, and will have to be filed on BW 3–3.

Exam. GRAY. Any further remarks?

(No response.)

Exam. GRAY. These hearings are adjourned until a future
114 date.

(Whereupon, at 2:30 o'clock p. m. the consolidated hearings were adjourned as above noted.)

Exhibit No. 2 for Identification Only

114–A DETROIT AND CLEVELAND NAVIGATION COMPANY

DETROIT, *February 5, 1941.*

R: Stmr. "George W. Mead."

Mr. T. J. MCCARTHY,
President T. J. McCarthy Steamship Co.,
Detroit, Michigan.

DEAR SIR: This will serve as formal notification that the Detroit and Cleveland Navigation Company exercises the option of renewing the charter of the steamer "George W. Mead", for the season of 1941 in accordance with terms of contract dated February 18, 1937 and amendments thereto.

Yours truly,

DETROIT AND CLEVELAND NAVIGATION COMPANY,
JAMES MCMILLAN, *Secretary.*

J. Mc. M./N.
cc W. R. E. Marshall.

114–B DETROIT AND CLEVELAND NAVIGATION COMPANY

DETROIT, *January 19, 1940.*

T. J. MCCARTHY STEAMSHIP CO.,
Detroit, Michigan.

(Attention: Mr. T. J. McCarthy, President.)

GENTLEMEN: This will serve as formal notification that the Detroit and Cleveland Navigation Company exercises the option of renewing the charter of the steamer "Geo. W. Mead" for the season of 1940 in accordance with terms of contract dated February 18, 1937, and amendments thereto.

Yours truly,

DETROIT AND CLEVELAND NAVIGATION COMPANY,
General Manager.

CLP: f,
cc W. R. E. Marshall.

114–C DETROIT, *January 27, 1939.*

Stmr. "Geo. W. Mead"

T. J. McCARTHY STEAMSHIP CO.,
Detroit, Michigan.

(Attention: Mr. T. J. McCarthy, President.)

GENTLEMEN: This will serve as formal notification that the Detroit & Cleveland Navigation Company exercises the option of renewing charter of the Steamer "Geo. W. Mead" for the season of 1939 in accordance with the terms of the contract dated February 18, 1937, with the understanding that certain amendments discussed in our Mr. Perkins office on January 15, last, will be added to the charter agreement covering operation during the 1939 season.

Yours truly,

DETROIT & CLEVELAND NAVIGATION COMPANY,
J. I. McMILLAN, *President.*

J. Mc. M./N.,
cc-W. R. E. Marshall.

114–D DETROIT, *March 20, 1937.*

In Re Charter on Steamer "George W. Mead"

T. J. McCARTHY STEAMSHIP COMPANY,
210 Wayne Street, Detroit, Michigan.
Attention: Mr. T. J. McCarthy.

GENTLEMEN: Following discussions between you and the writer, it is our understanding that paragraph 6 of the Charter may be so amended as to provide that the Consolidated Water Power & Paper Company, assignee of Newago Tug Line, Inc., may likewise be named as an assured under the policies provided for in that paragraph, and that it may be further amended so as to provide that the loss payable clause or clauses of the policies shall provide that the loss or lossess shall be paid to the T. J. McCarthy Steamship Company, Owner, the Consolidated Water Power & Paper Company, Mortgagee, and the Detroit & Cleveland Navigation Company, Charterer, as their respective interests may appear.

It is our further understanding that all other terms and provisions of the said Charter, including those provisions of paragraph 6 not specifically amended by this letter, are to remain unchanged and in full force and effect.

Would thank you to accept this amendment at the bottom of this letter and return it in triplicate for our files.

There is also enclosed form of receipt which it is suggested you obtain in making your payments under the mortgage on the "Mead." We are asking that you obtain this receipt so that our records may be complete from month to month.

Yours very truly,

DETROIT & CLEVELAND NAVIGATION COMPANY,
By (Sgd.) WM. K. MUIR.

Accepted;

T. J. MCCARTHY STEAMSHIP COMPANY,
By (Sgd.) T. J. MCCARTHY, *President.*

114–E *Agreement and charter*

This agreement and chapter concluded this 18th day of February A. D. 1937 between T. J. McCarthy Steamship Company, a corporation organized under the laws of the State of Michigan, having its principal office in the City of Detroit, Michigan (hereinafter called the Owner), sole owner of the Steamer "George W. Meade," and Detroit and Cleveland Navigation Company, a corporation duly organized under the laws of the State of Michigan, with its principal office in the City of Detroit, Michigan (hereinafter called the Charterer); witnesseth:

The Owner does hereby charter and let unto the Charterer the Steamer "George W. Meade" for the lake season of navigation of 1937 for operation, transportation and carrying of cargoes on the Great Lakes, their connecting and tributary waters.

(1) The Owner agrees that at the commencement of the term of this Charter the said Steamer "George W. Meade" will be tight, staunch and strong, well and sufficiently tackled, appareled, furnished, outfitted and equipped and in every respect seaworthy and in good running order and consideration and fit for the service for which she is chartered hereunder.

It is further agreed that the Owner will pay all of the expense of fit-out, including all expenses which may be necessary to procure the approval of the vessel by the United States Local Inspectors of Steam Vessels and their certificate for the vessel for the coming season, and will do any and all things necessary to have the vessel classed or approved so that the insurance to be placed by the Charterer as hereinafter provided may be obtained. The
114–F Owner likewise agrees to stand all expenses of whatever nature to connection with establishing and marking the loadline of said vessel in the event it is necessary under the laws of the United States or any other regulatory body or commission that this be done during the currency of this Charter.

(2) The Charterer agrees that the said Steamer "George W. Meade" during the term of this Charter shall be officered and manned as required by the United States rules and regulations governing same and that the said Steamer shall be operated in all respects in a seamanlike manner and in accordance with the laws, regulations and rules pertaining to the navigation of vessels on the Great Lakes.

(3) The Charterer agrees that beginning with date of delivery of the said Steamer "George W. Meade" to it at Detroit, Michigan, and during the term of this Charter, it will pay all costs of maintenance and operation of said vessel, including, without limiting the generality of the foregoing, such expenses as wages of licensed officers and of the crew, cost of fuel, oils, grease, and engineer's supplies and all supplies necessary or proper for the steward's department, supplies for the mate's department, towing ex-
114-G penses, repairs and upkeep of said vessels and equipment, machinery, boilers and appurtenances other than those which may be recoverable under the policies of insurance provided for in Article Sixth hereof which shall be taken out by the Charterer.

(4) It is further agreed that prior to the commencement of operation of said vessel by the said Charterer a full and complete inventory shall be made of all the fuel, stores, appurtenances, furniture and equipment including freight handling equipment aboard and belonging to the said Steamer, said inventory to be made jointly by a designee of the Owner and a designee of the Charterer, and upon completion of said inventory it shall be reduced to writing and signed by the said designees as representatives of the respective parties and the same shall be binding to its extent upon both the Owner and Charterer, and on completion of said Charter Party no claim shall be made for loss of fuel, stores, equipment, furniture or appurtenances unless such fuel, stores, equipment, furniture and appurtenances be noted in said written inventory. The Charterer further agrees that at the expiration of the Charter it will repair, replace or pay the value of any item or items of the foregoing property or its equivalent found to be consumed, missing or damaged in order that the said property shall be as full, complete and in as good condition, ordinary wear and tear excepted, as the said property shall be at the beginning of said Charter.

(5) It is further agreed that prior to the acceptance of said vessel under this Charter by the Charterer the condition
114-H of the ship shall be noted and any visible damage surveyed and included in a written report of survey to be

made jointly by designee acting for the Owner and a designee acting for the Charterer, and upon completion of said survey it shall be reduced to writing and be signed by the representatives of both parties, and the same shall be binding to its extent upon the Owner and Charterer as to the condition of the ship and any visible damage at the time of the execution of this Charter Party.

The Charterer further agrees to permit the Owner of the vessel, through its authorized representatives, to inspect said vessel from time to time for the purpose of ascertaining that she is being maintained by the Charterer in a careful and efficient manner, and Charterer agrees to carry out any reasonable instructions in regard thereto as the Owner of said vessel deems necessary for the proper maintenance and upkeep of said vessel, except that the Owner by such inspection shall not interrupt the service of said vessel.

It is further understood and agreed that, providing the consent of the Owner by first obtained, the Charterer shall have the right to install on said vessel additional equipment and shall also have the right before redelivery of said vessel to the Owner to remove such equipment, or such part thereof as can be removed. The cost of such additional equipment and all expenses of installation and removal thereof shall be paid for by the Charterer which shall also at its own expense make all repairs and replacements as may be necessary in order that the said Steamer "George W. Meade" may be in the same condition as she
114-I was prior to the installation of said additional equipment.

(6) The Charterer agrees that it will procure and pay for all ordinary hull insurance, including fire insurance, also protection and indemnity insurance with Longshoremen's qualifying policy covering the said Steamer "George W. Meade," said policies to be on the current Great Lakes standard forms as applicable to a boat of the type and class of the "George W. Meade," for the season of 1937, each class of insurance to be in the amount ordinarily obtainable on a vessel of the size and class of the Steamer "George W. Meade"; provided, however, the Owner shall pay all excess cost of insurance on said Steamer over and above the so-called dual valuation basis. It is understood that the Owner shall be named as an assured in all of the above policies of insurance and that the loss payable clause of the policies shall provide for payment to T. J. McCarthy Steamship Company, Owner, and Detroit and Cleveland Navigation Company, Charterer. It is understood and agreed, however, that the Charter will indemnify

and save harmless the Owner and Steamer "George W. Meade" of and from any and all claims arising out of the operation of said Steamer of any nature whatsoever not covered by said policies of insurance (except any such as may arise out of or through the action or fault of the Owner); and also that any deductible average payable under the terms of said policies or
114–J otherwise shall be for the account of the Charterer which hereby agrees to pay the same. If the Charterer desires to use said vessel on any trips starting prior to April 15th, 1937, or later than November 30th, 1937, the Charterer agrees to obtain pre-season or extended insurance for said vessel insuring both the Owner and Charter to the same extent as hereinabove provided with respect to insurance during the regular season of navigation, the cost of such pre-season or extended insurance to be paid for by the Charterer.

(7) The Charter agrees to pay as charter hire for said Steamer "George W. Meade" the sum of _____ (_____) for the season of 1937, including the period to April 15th and after November 30th in the vent that the said Charterer should elect to use the said vessel prior to April 15th or later than November 30th, which said charter hire is to be payable as follows: _____ (_____) on delivery of the said vessel to the Charterer, and the balance of _____ (_____) in seven (7) equal installments of _____ (_____) and payable each thirty (30) days thereafter. It is specifically understood and agreed that the said charter hire of _____ (_____) is to be net to the Owner, that there shall not be any deductions therefrom of any sum whatsoever for any expenses arising out of the operation, maintenance, insurance and redelivery of said vessel, and the only expense of any kind whatsoever which the Owner is to bear is such expense as may be necessary to fit out and to place said vessel in
114–K condition to procure and maintain her Steamboat Inspection certificate and her classification certificate.

The above contemplates that the Owner will pay the expenses of any and all structural or other changes, or changes, alterations or betterments to machinery or equipment which may at any time be ordered by the Steamboat Inspection Service or any government agency in pursuance of any present or future laws of the United States, or as may be necessary to maintain and continue her classification. The Owner shall pay all expense of lay-up after redelivery of the vessel to the Owner.

(8) It is understood and agreed, anything to the contrary notwithstanding, that said vessel shall not start upon any voyage

later than the 12th day of December 1937, and that the Charter shall terminate absolutely not later than that date.

(9) Neither the Charterer nor the master of the Steamer shall have any right, power or authority to create, incur or permit to be imposed upon the Steamer any lien whatsoever except for crew's wages and salvage.

The Charterer agrees to carry a properly certified copy of this Charter Party with the ship's papers and on demand to exhibit the same to any person having business with the Steamer which might give rise to any lien thereon other than liens for crew's wages and salvage.

(10) The Charterer agrees that it will not suffer or permit to be continued any lien or encumbrance of any character upon or against the said Steamer which has or might have priority
114-L over the title and interest of the Owner of said Steamer, and said Charterer agrees that it will keep the said Steamer free and clear of all debts, claims and liens whatsoever (except such as may arise by or through the Owner) during the said term, and that upon termination of this Charter, whether by limitation or otherwise, to return said Steamer to said Owner at the port of Detroit, Michigan, in like good order and condition as when taken, ordinary wear and tear excepted, and said Charterer further agrees to fully indemnify and protect said Steamer and its Owner against any and all claims or liens that may be asserted during the term hereof or thereafter through or on account of said charter for the use and operation of said Steamer by said Charterer, its agents or employees.

(11) If at any time after the delivery of said Steamer to the Charterer hereunder the Charterer shall fail to perform any of its duties or obligations or shall violate any of the provisions imposed upon it under this Charter, the Owner may, without prejudice to any other rights which it may have under this Charter, withdraw and retake the said Steamer wherever the same may be found, whether upon the high seas or in port, harbor or other places, and without prior demand and without legal process, and for that purpose may enter upon any dock, pier, or other premises where the said Steamer may be and take possession thereof.

(12) At the termination of this Charter the Charterer agrees to return said Steamer to the Owner at the port of Detroit, Michigan, in the same condition as when she was delivered, reasonable wear and tear excepted; provided that it is expressly
114-M agreed that in the event of a total loss or constructive total loss of said Steamer the Charterer is relieved from the obligation of returning the said vessel to the Owner as herein provided.

(13) The Charterer further agrees that in the event said Steamer shall be used for the transportation of any commodity (other than automobiles) which, because of its inherent nature, causes damage to or depreciation of the vessel, that repairs necessitated or damage or depreciation caused by said service shall be borne and paid for by the Charterer, ordinary wear and tear in such event not being excepted.

(14) The parties hereto further mutually agree that in the event of a total loss and or constructive total loss of said Steamer, charter hire shall terminate upon the date of said total loss or constructive total loss. In the event, however, of a loss other than total loss or constructive total loss, irrespective of the cause of the same or the duration of the delay occasioned thereby, the charter hire shall be paid in full as hereinabove provided.

(15) It is further understood and agreed that in the event of any delay or default in the payment of the charter hire at the times hereinbefore specified the Charterer is to pay interest at the rate of six percent (6%) per annum from the date when said installment was due until the same has been paid. All payments to the Owner and any obligations wherein money is involved shall be expressly understood as requiring payment in American currency or drafts or checks negotiable at par at Detroit, Michigan.

114-N (16) Anything to the contrary notwithstanding, it is expressly agreed that in the event of war, riot, civil commotion, rebellion, insurrection, labor disturbances, or strikes, whether involving the automobile industry or maritime or dock workers, or otherwise, or other conditions beyond the Charterer's control, whereby the obtaining of cargoes for or the operation of said vessel is interrupted, and the same shall continue for a period of ten (10) successive days, the Charterer shall be relieved from the payment of charter hire hereunder for the period of interruption.

(17) In consideration of the entering into of this Charter, the Owner does hereby give and grant to said Charterer the right and option to renew and extend this Charter on the same terms and conditions from season to season for the seasons of navigation of 1938, 1939, 1940, 1941, and 1942, providing that on or before February 1st in the year following a previous year's charter; the Charterer shall notify the Owner by written notice, mailed and addressed to it at 210 Wayne Street, Detroit, Michigan, of its election to exercise its option to renew and extend Charter for the next season. Whereupon, this Charter shall be automatically renewed and extended and be binding and effective between the parties hereto for such ensuing season of navigation.

In witness whereof, the parties hereto have
114–O caused this instrument to be signed by their respective officers hereunto duly authorized, and their respective seals to be hereto affixed, the day and year first above written.

AUTOMOTIVE TRADES STEAMSHIP COMPANY,
By (Sgd.) T. J. MCCARTHY, *Its President.*

DETROIT AND CLEVELAND NAVIGATION COMPANY,
By Sgd.) JAS. R. COULTER, *Its Vice President.*
In the presence of:

(Sgd.) ANGELENE BENSON.
(Sgd.) WM. K. MUIR.

115 Before the Interstate Commerce Commission

Docket No. W–592

APPLICATION OF T. J. MCCARTHY STEAMSHIP COMPANY FOR A CERTIFICATE TO OPERATE AS A COMMON CARRIER IN THE TRANSPORTATION OF PROPERTY BETWEEN PORTS ON THE GREAT LAKES

Docket No. W–729

AUTOMOTIVE TRADES STEAMSHIP COMPANY (APPLICATION TO OPERATE AS A COMMON CARRIER BY WATER)

HOTEL FORT SHELBY,
DETROIT, MICHIGAN, *February 13, 1942.*

Met, pursuant to notice, at 9:30 a. m.

Before J. P. MCGRATH, Examiner.

Appearances: Same as hereinbefore noted and the following additional appearance: Charles E. Lewis, 2828 Union Guardian Building, Detroit, Michigan, appearing for Detriot and Cleveland Navigation Company, protestant.

115B PROCEEDINGS

Exam. MCGRATH. The hearing will come to order, please.

The Interstate Commerce Commission has assigned for further hearing at this time and place dockets Nos. W–592 and W–729, the applications of the T. J. McCarthy Steamship Company and Automotive Trades Steamship Company, respectively, under Section 309 (a) of the Interstate Commerce Act, for authority to